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THE

HISTORY OF MORTMAIN,

AND

LAW OF CHARITABLE USES.

A

SUCCINCT VIEW

OF THE

HISTORY OF MORTMAIN;

AND THE

STATUTES

RELATIVE TO

Charitable Uses;

WITH

A FULL EXPOSITION

OF

THE LAST STATUTE OF MORTMAIN,

9 GEO. II. C. 36. AND ITS SUBSEQUENT ALTERATIONS:

COMPRISING THE LAW AS IT NOW STANDS RELATIVE TO DEVISES, BEQUESTS, VISITATION, LEASES, TAXES, AND OTHER INCIDENTS TO THE ESTABLISHMENT OF

PUBLIC CHARITIES.

THE SECOND EDITION,

WITH MANY ADDITIONAL CASES, AND SEVERAL NOT HITHERTO REPORTED.

BY ANTHONY HIGHMORE, GENT.

"Ita semper quod pia et celeberrima voluntas donatorum in omnibus teneatur et expleatur et perpetuo sanctissime perseveret."

St. de Templariis, 17 *Ed. II.* 8 Co. 131.

LONDON:

PRINTED FOR J. BUTTERWORTH, FLEET-STREET; AND J. COOKE, ORMOND-QUAY, DUBLIN.

1809.

R. WILKS, PRINTER,
89, Chancery-lane, London.

TO THE

RT. HON. SIR WILLIAM GRANT, M. P.

MASTER OF THE ROLLS,

&c. &c. &c.

WHOSE

EXTENSIVE LEARNING

AND

CORRECT JUDGMENT

HAVE ALWAYS DISTINGUISHED HIS DECISIONS;

AND TO WHOM

THE JUST DEFERENCE DUE TO THE JUDGE

IS

GRATEFULLY ENLARGED

BY THE

VENERATION DUE TO THE MAN,

THE FOLLOWING WORK,

AS A TRIBUTE OF UNFEIGNED RESPECT,

IS INSCRIBED, WITH HIS ASSENT,

BY HIS HONOR'S

OBEDIENT HUMBLE SERVANT,

ANTHONY HIGHMORE.

No. 33, Ely-Place,
Trinity Term, 1809.

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INTRODUCTION.

In presenting this second edition to the scrutiny and attention of the profession, if it may be deemed worthy of their notice, I cannot recur without grateful satisfaction to the manner in which the first was received, and the present has been called for; and as I then had great reason to solicit their favourable extenuation, I have no less earnest anxiety at this time to entreat their accustomed candour: the work will be found to have been much enlarged by the addition of most, if not all of the subsequent cases, to this period, which I have either found in the several reports, or which the kindness of some professional friends have communicated, and of others which have arisen in my own practice. That I might not extend the work too far, my desire of brevity has induced me to avoid the insertion of every case that has occurred; but all those which are the most material have been carefully noticed, and their principal points detailed; and where

where any adjudication comprised the essential parts of other cases, I have avoided a separate recital of them as unnecessary; but as the arguments in charitable cases are of a nature more general and comprehensive than on most other judicial subjects, and as most of the decisions contain principles of a more enlarged and extensive use, I have been frequently induced to insert the whole, rather than to hazard a mutilated substance.

In thus forming a new work, I have, however, preserved the model of the old one; but the arrangement of which will, it is hoped, appear to have been considerably improved.

The establishment of monastic institutions is to be deemed the fruitful parent of our modern charitable uses, and in this part of my progress I could have indulged a fondness for research into antiquities, by conducting my reader through many a venerable ruin, and by marking the transitory splendour of human pride, did not the more practical and useful part of my labours frequently arrest my step, and place me in the centre of our own *aula regis*, where the administration of equity and justice, raised upon the unshaken basis of a trifold legislature, presents a lustre

a lustre far more glorious, and a monument of wisdom far more durable and permanent.

The benevolent energy of christianity received, by the effects of the Reformation, an expansion which, under its former restraints, it could never have acquired; it has since diffused itself with a more genial influence, because every man has learnt his own capacity to guide and direct it; while its exertions were confined to one order of men, the others merely exercised a blind beneficence; and as every gift was expected to be munificent, pride or ostentation, superstition or fear, alternately misguided opulent benefactors, and real charity was reserved for a future day to become, as it has since become, universal. The evidence of this principle is the volume here offered to consideration: the restraints of mortmain, and the limitations wisely placed by the legislature and by the courts upon charitable uses, amply evince, at the present day, when very few of the ancient motives can fairly be said to prevail, the liberal state of the public mind, the love and charity borne towards one another, and the anxious desire of all, that a due proportion of national and individual prosperity should be devoted towards the relief of suffering

and

and distress; and it must ever form the prayer of a true patriot, that the urbanity and compassion, which have ever dignified the character of the United Kingdom, from the cottage to the throne, may by no vicissitude of public or of private fortune ever be relaxed or subverted!

"The liberal spirit of this nation at the present hour (says Dr. Vincent) is all directed to its proper end: it is in every instance designed to relieve unavoidable distress, or promote industry; and whatever promotes industry augments the sum of happiness in the world. *Designed*, I say, and I hope executed; for in every charity where attention is paid to economy, each subscriber can do more good by his subscription, than by expending the same sum on the same objects himself*."

The perusal of the following work will prove that the energy which actuates the breast of virtuous charity, finds a ready asylum in the courts of equity, where it has been declared that the statute of mortmain was never designed to prevent charities, but to restrain a too copious endowment of them, to the detriment of the com-

* Dr. Vincent's Discourse to the People of England.

munity

munity—and where it has been always found that the utmost ambiguity, or uncertainty of expression in the will of the donor, shall be supplied and interpreted in favour of charity, if it can in any wise be discovered what charity was designed. But though the legislature has thought fit to leave all personal estate at the free disposition of its possessor, and though our courts of law and equity are thus well disposed to encourage the promotion of every good work of this kind*, still there may arise considerations, which, if duly weighed, may perhaps operate in some degree towards restraining an unlimited extension in the number of charitable institutions with which this metropolis is surrounded, and with which the country abounds. Their great number tends to injure the support of each other, which generally depends on voluntary and casual contributions: and those which have not the means, or do not by the most frugal management

* There are four objects; within one of which, all charity to be administered in the court of Chancery must fall: —1. Relief of the indigent, in various ways; money, provisions, education, medical assistance, &c.; 2. The advancement of learning; 3. The advancement of religion; and 4. which is the most difficult, the advancement of objects of general public utility. 10 Vez. jun. 561.

preserve

preserve a permanent capital, must be considered as standing upon a very uncertain foundation.

There are many institutions of charity of so similar a nature in their object and extent, and embracing so nearly the same districts, that they might easily be united; and thereby the incomes, which barely serve to keep up their respective annual expence, would enable the directors to relieve a considerably greater number of poor. By this union, the very serious charge of so many separate establishments of houses and offices would be saved.

But the motives which have given birth to some of the modern institutions of charity, have not always been founded in principles of true charity, though it must be confessed that they may have relieved hundreds of the indigent poor. Ill success at an election to some office, and the unwarrantable practice of purchasing offices, by laying down subscriptions for a long list of names, so as to outvote an adversary, and swallow up the choice of the majority of the old patrons, have successively been productive of new institutions, set up for the support or the introduction to practice of young professional men,

men, whose ambition or interest was the first consideration for the establishment.

Where such conduct is suffered to prevail, all discrimination of merit or skill is thrown aside; and the poor, who are to be relieved by the successful purchaser, are devoted to the chance of his inexperience: this momentary influx of money to the charity is pregnant with a future evil, infinitely counterbalancing the present advantage; for, at the expiration of the subscriptions so brought in, they are scarcely ever renewed, and the offence given to the former subscribers is sufficient to induce them to withdraw the support of themselves and their friends, and to leave the institution to the fate of a fresh struggle for annual competence, with perhaps the novelty of additional competitors to contend with.

The prevention of an evil of this serious tendency, both to the institution established and to the poor, seems to rest upon a rule which has been made in some very respectable charities in and near the metropolis, and which is now earnestly recommended to all others, viz. "That no new annual subscribers shall be competent to vote in any election, unless their subscription

shall have been paid six calendar months previous to the day of election."

Again: I cannot omit recommending to the governors of all charitable institutions a strict investigation into a practice which prevails, and is in many, though not in all of them, regularly allowed; a practice which tends to the disgrace of this country—to the ruin of every principle or emotion of gratitude which might arise in the breast of a patient feeling the blessings of recovery while under their protection—which leads many of the indigent and distressed to undervalue the benevolent motives of their benefactors, and which opens a source of corruption inconsistent with the principle of every charitable foundation. I mean the practice of levying fees upon patients at their admission to, during their residence in, or at their discharge from, several of our principal hospitals. The wages of nurses and servants are thus, in part, drained from the scanty pittance of the poor, whose difficulty and delay in previously providing themselves with money and necessaries often retard their admission till the ravages of their complaint leave them but a hopeless prospect of recovery. If admitted through

through prevailing entreaties and the extremity of their case, without these payments they must despair of receiving all the attention necessary; and if it be granted them, the smallest act of duty is made to wear the semblance of favour and liberality. On the other hand, if they have money enough for the purpose, all gratitude is stifled by the right of an apparent purchase.

Finally: I beg leave earnestly to submit these few considerations to those who humanely "make charity their care," whose liberal zeal has irradiated their own and their country's praise, and whose example and influence over the minds and consequent actions of the poor is of as much importance to their welfare as any laws for the regulation of their conduct.

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THE HISTORY OF MORTMAIN:

PART I.

CHAPTER I.

OF THE ESTABLISHMENT AND DECLINE OF MONASTIC INSTITUTIONS.

As history, in its delineation of the character of men, affords a material elucidation of their motives and their measures, it can need but little apology, that, in a chronological detail of the statutes which have been passed to restrain alienations in *mortmain*, we should take a transient view of the times and causes which gave rise to them; more apology would be necessary for any censure that may be found against monastic subtlety, were it not supported by the unbiassed dictate of historic truth.

Long before the invasion of the Danes, when England was yet in its rude and uncultivated state, the innocence and ignorance of the people seem to have subjected them for the most part to the influence and commands of the Druid chiefs, and the heads of their respective clans; they seem to have lived in an implicit obedience to unlimited control; and though their possessions were

secured by first occupancy and labour, yet this control was often exerted to supply the requisites of general or particular maintenance, ambition, caprice, or superior power; and although their labour was small, yet they preferred the procuring sustenance by the pleasures of the chase, to the labour of cultivating the soil for the fruits of the earth. In process of time, as each clan, or family, increased in years and strength, emulation strove to possess the mastery, and thus various chiefs were set up in the room of a general and familiar acquiescence under one father: intestine feuds, and bloodshed, the natural consequence, disrobed many of the inhabited parts of the island of their tranquillity; and, whether as arbiters or as peace-makers, or commanded, as they declared, by holy inspiration, the bards struck the lyre, and as often led on one clan to the slaughter of another as they ever endeavoured to promote the blessings of peace; the wounds of one quarrel were seldom healed without giving place to new eruptions.

These holy visitants were generally occupied in fanning the fatal flame; which, while it raged, drew into their coffers the small treasures of the people! In proportion, however, as more regularity and order gained acceptance throughout the country, and as the people saw and felt the superior advantages of uniting under the obedience of a popular government, we find in very ancient writers, that the bards lost great part of that superstitious influence, which they had so artfully exerted; and though they secluded themselves in groves and caverns, which they hallowed with a mystical secrecy of religious but artful veneration, yet the people did not continue so readily to acquiesce in their power over general affairs, but accorded to them supreme authority in all matters relative to sacred rites; and it is certain, that very

very large tributes were even then exacted from the people, and deposited in these pious retreats, as offerings, to insure happiness and eternal fame.

But this barren and useless superstition, at length, fell into disrepute, and gave place to christianity. The progress of ecclesiastical authority in Europe, at length, gave birth to the venerable distinction of clergy and laity. The community of goods was adopted for a short time in the primitive church. Instead of an absolute sacrifice, a moderate proportion was accepted; nothing, however inconsiderable, was refused. These oblations, for the most part, were made in money; nor was the society of Christians either desirous or capable of acquiring, to any considerable degree, the incumbrance of landed property. It had been provided by several laws, which were enacted with the same design as our statutes of mortmain, that no real estates should be given, or be allowed, to any corporate body, without either especial privilege or a particular dispensation from the emperor, or from the senate*; who were seldom disposed to grant them. A transaction, however, is related under the reign of Alexander Severus, which discovers that the restraint was sometimes eluded or suspended, and that the Christians were permitted to claim and to possess lands within the limits of Rome itself. The progress of Christianity, and the civil confusion of the empire, contributed to relax the severity of the laws; and before the close of the 3d century, many considerable estates were bestowed on the opulent churches of Rome, Milan, Carthage, Antioch, Alexandria, and the other great cities of Italy and the provinces. Hist. Aug. 131.

* Dioclesian gave a rescript, which is only a declaration of the old law: Collegium, si nullo speciali privilegio subnixum sit, hæreditatem capere non posse, dubium non est. Fra. Paolo (c. 4.) thinks that these regulations had been much neglected since the reign of Valerian. Gibbon, ii. 345.

The bishop was the natural steward of the church; the public stock was entrusted to his care, without account or control; the presbyters were confined to their spiritual functions; and the more dependent order of deacons was solely employed in the management and distribution of the ecclesiastical revenue. Not to dwell upon the abuses of its application in some respects, it is acknowledged, that after the expences of the maintenance of the bishop, his clergy, and their worship, the whole remainder was the sacred patrimony of the poor. According to the discretion of the bishop, it was distributed to support widows and orphans, the lame, the sick, and the aged of the community; to comfort strangers and pilgrims, and to alleviate the misfortunes of prisoners and captives, more especially when their sufferings had been occasioned by their firm attachment to the cause of religion. A generous intercourse of charity united the most distant provinces, and the smaller congregations were cheerfully assisted by the alms of their more opulent brethren. Such an institution, which paid less regard to the merit than to the distress of the object, very materially conduced to the progress of Christianity. The advantages of immediate relief, and of future protection, allured into its hospitable bosom many of those unhappy persons whom the neglect of the world would have abandoned to the miseries of want, of sickness, and of old age. There is some reason, likewise, to believe, that great numbers of infants, who, according to the inhuman practice of those times had been exposed by their parents, were frequently rescued from death, baptised, educated, and maintained by the piety of the Christians, and at the expence of the public treasure.

2 Gibbon, 345, and seq.

The priesthood, with uncommon and unexampled zeal, settled in various parts of this island, under every disadvantage, except those of a fertile soil, their own unrestrained

restrained resolution, and a careful choice of an advantageous ground; huts and hovels in some recluse parts, were the only residence of themselves and their mysteries; they had acquired the habit and skill of industry and labour, through necessity and vicissitude, and they shared with each other the alternate duties of agriculture and prayer. The chiefs of clans, or families, or districts, resorted thither to pay their sacred homage; and if they left behind them any token of their sincerity, they seldom departed without some useful instruction in religion or in life.

The origin of monastic institutions in Europe is to be found in the middle of the 3d century. Prosperity and peace introduced the distinction between the vulgar and the *ascetic* Christians. The latter seriously renounced the business and the pleasures of the age; abjured the use of wine, of flesh, and of marriage; chastised their bodies, mortified their affections, and embraced a life of misery, as the price of eternal happiness. In the reign of Constantine, the Ascetics fled from a prophane and degenerate world, to perpetual solitude or religious society. Like the first Christians of *Jerusalem*, they resigned the use or the property of their temporal possessions; established regular communities of the same sex, and similar dispositions; and assumed the names of Hermits, Monks, and Anchorets, expressive of their lonely retreat in a natural or artificial desert.

Egypt afforded the first example of monastic life. *Antony*, at Mount *Colzim*, in A. D. 251 to 356; *Athanasius*, at Rome, in 341; and various other patriarchs, spread their followers over many parts of the eastern and western empires, and into Ethiopia, with astonishing rapidity and numbers. The monastery of *Bancbor*, in *Flintshire*, which contained above 2000 brethren, dis-

persed a numerous colony into *Ireland*, and thence to *Iona* and the *Hebrides**.

It was naturally supposed that the pious and humble monks, who had renounced the world to accomplish the work of their salvation, were the best qualified for the spiritual government of the Christians. The reluctant hermit was torn from his cell, and seated amidst the acclamations of the people on the episcopal throne. The monasteries of Egypt, of Gaul, and of the East, supplied a regular succession of saints and bishops, and ambition soon discovered the secret road which led to the possession of wealth and honours †.

The novice was tempted to bestow his fortune on the saints, in whose society he was resolved to spend the remainder of his life; and the pernicious indulgence of the laws permitted him to receive, for their use, any future accessions of legacy or inheritance ‡.

From this foundation it is no difficult task to trace the extent of monastic institutions, and monastic influence, in our own island. As the Christian faith began to spread itself amongst our ancestors, the donations of the lords and great landholders became more numerous and more liberal, and their visits to those pious residences more frequent and more fruitful. Still, however, the revenues of the clergy were not very considerable; but King Ethelwulph, anno 855, made them a grant of the tithe of all his dominions, which increased them to that degree, that it gave cause to some of his successors to lament in vain the good monarch's liberality. (Rapin has preserved a copy of this grant, and there is another in the Monasticon, p. 100.)

* 6 Gibbon, 238, and seq. 1 *Camd. Brit.* 666.
† Ibid. 247.
‡ Ibid. 258.

In

In those times of dark and ill-judging superstition, the austerity of self-devoted wretchedness often reduced human nature to its last verge of existence, or plunged it into horrors, from which the mild and persuasive exhortations of Christianity offered in vain to lead the fanatic. In the absence of that serenity of heart which true religion inspires, the forlorn and miserable forgot their own virtues, their domestic and public duties, their regard to society, and the tender calls of conjugal or filial affection; and, rushing into an unbrotherly solitude, devoted their possessions to build altars, hospitals, and monasteries, and to burn incense, to appease the vengeance which their heated imaginations alone had conceived to be hovering over them: thus they incurred new sins, by an external service to that Being whose favour had been more acceptably or successfully implored, by directing the same contrite zeal to the performance of the duties of the station in which he had been pleased to place them. If so much zeal ever really actuated any of the founders of monasteries, yet I am afraid superstition and some share of ostentation were not often silent in their persuasions to so eminent an exhibition of public regard!

Thus from the rapid increase of charitable and pious donations, arose the splendour of cathedrals and churches, not now easily to be conceived. In every part England was planted with monastic establishments: in London stood the mitred abbeys of *St. John*, and of *Westminster*, in addition to the convents of nuns, and the abodes of monks and of friars, black, white, and grey. 1 Godwin's Chaucer, 45.

The increasing resources of invention kept pace with the increasing spirit of religious homage. Auricular confession, indulgences, and masses for the dead, with innumerable other means of amassing wealth, became the

powers of visitation were first granted to the ordinary to enquire, and reform them. These hospitals were thus instituted, as the word *hospitium* denotes, for the reception, relief, and entertainment of the poor, aged, infirm, sick, and otherwise helpless; and are, in this respect, distinguished from alms-houses, which are merely for the reception of the indigent and necessitous*.

It is most reasonable to conclude, that the new and enlightened principles which every where burst forth at the reformation, were the source of that happy alteration in the minds of opulent and charitable persons, which directed their liberality to the relief of the afflicted poor, when its channel was diverted from the support and contribution of papal craft, dissimulation, and idolatry.

Henry VIII. However grievous the ravages of a regal tyrant might have been to some recluse and sincere orders of monks, yet they swept away a multitude of inordinate vices, and purified the land from the severer dangers of sedition, hypocrisy, and pride: the professed servants of pious delusion had grown opulent on the ill judged offerings of their trembling penitents; they first presumed to be masters of their consciences, and then insultingly jested at the large tributes which, by terrifying denunciations of future heavenly vengeance, they extorted from their alarmed imaginations. But, thanks be to God, the restraints, which it was necessary for the legislature to impose on these devices, by the several statutes of *visitation* and of *mortmain*, at first proving ineffectual and inadequate to subdue the cunning and artifice of monastic

* Aurengzebe being asked why he did not build hospitals, said, "I will make my empire so rich, that there shall be no need of hospitals." He ought to have said, I will begin by rendering my empire rich, and then I will build hospitals.

Sir J. Chardin, vol. VIII. 2 Sp. Laws, c. xxix.

subtlety,

subtlety, at length rose into a total suppression of their societies, and abrogating their delusions, laid the corner-stone of the modern receptacles for the relief of indigence and disease *.

* Some of the commissioners who visited the abbies petitioned the king (Henry VIII.) to spare them; and declared that the poor received from them great relief, and the rich good education; and the bill for the suppression of colleges and chantries promised that the estates of these foundations should be converted to good and godly purposes, in erecting grammar-schools, in the further augmentation of the universities, and in better provisions for the poor and needy. The rapacity, however, of the courtiers rendered this project impracticable.

Lord Herbert's Hist. of Hen. 8. 1 Ed. 6. c. 14.

1 Eden, State of the Poor, 95.

CHAP.

CHAPTER II.

OF THE RESTRAINTS OF ALIENATION IN MORTMAIN, TO THE PERIOD OF THE REFORMATION.

Speed. 418. b. A. D. 1066.

WILLIAM the Conqueror, demanding the cause why he himself conquered the realm by one battle, which the Danes could not effect by many? Frederick, the Abbot of St. Alban's, answered, that the reason was, because now the land, which was the maintenance of martial men, was converted and given to pious employments, and for the maintenance of holy votaries. To which the Conqueror replied, that if the clergy be so strong, that the realm is enfeebled of men for the war, and subject thereby to foreign invasion, he would aid it: and therefore took away many of the revenues of this Abbot, and of others also. I take this to be the origin of all our restraints of *mortmain*.

2 Bl. Com. 268.

Alienation in *mortmain*, in mortua manû, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or civil. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of *mortmain* to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of *mortmain*.

Ibid. 1. 479.

9 Hen. 3, c. 36. A. D. 1238. Fitz. Mortm. 1. 3. Bro. Mortm. 36. 2 Inst. 74.

By the 36th article of Magna Charta, it is ordered thus: "It shall not be lawful from henceforth, to any, "to give his lands to any religious house, and to take the "same land again to hold of the same house. Nor shall "it

"it be lawful to any house of religion, to take the lands "of any and to release the same of him, to him to "whom he received it. If any from henceforth give his "lands, and thereupon be convict, the gift shall be ut- "terly void, and the land shall accrue to the lord of "the fee." Wood Inst. 301, 182.

The cause of this article was, to correct an evasion, ingeniously invented by the clergy, to surmount the difficulty of their being obliged to procure from the crown a licence to purchase in *mortmain*; which seems to have been the practice among the Saxons above sixty years before the Norman conquest, and continues appended to the prerogative at this day; and also a like license to alienate, whenever there was a mesne or intermediate lord between the King and the alienor: thus, as the forfeiture accrued to the immediate lord, the possessor instantly alienes to the religious house, and then took the lands back again as tenant thereto, which kind of instantaneous seisin, was probably held not to occasion any forfeiture: and then by committing some other act of forfeiture, surrender, or estheat, the monastery entered as immediate lord. Seld. Jan. Angl. l. 2, s. 45. F. N. B. 121. Licenses. 18 Ed. 3. st. 3. c. 3. 15 R. 2. c. 5. 7 & 8 W. 3. c. 37. 2 Bl. Com. 269.

About this period, we find the greatest part of Europe amused by those holy expeditions, called *crusades*: pomp and magnificence, a vast retinue, large bounties, and great expence, always accompanied the journey of imaginary salvation. The princes of Christendom vied with each other in a splendid and dazzling homage to the holy cross; the banners of each potentate blazed before the world, and deluded multitudes fell prostrate, with mistaken zeal, at the approach of these fanatic baubles, in preference to the pure simplicity of the true faith. The spiritual Babylon now reigned the idol of bigoted frenzy; and while the people vainly thought they sacrificed to Christ, they were literally bending the knee to Baal. A. D. 1248.

Edward

A. D. 1272. Edward the First ascended the throne with the strongest testimonies of a desire to reform the abuses which had found their way into his kingdom. The prodigious increase of the riches of the clergy, from the causes already mentioned, and of the monasteries also, had long been a subject of public complaint; and no one had been able to discover an effectual method to put an end to an evil so prejudicial to commerce, and to the state. Although the barons, who exacted from King John the great charter, still so deservedly revered, had taken care to insert the clause already mentioned, forbidding alienations of lands to the church; yet this had not been regarded. Complaints were renewed on this and many other subjects, and kept pace with the hopes in which every one exulted, that all their grievances would now be redressed. It was demonstrated to the aspiring king, that the church never dying, always acquiring and never alienating, her riches must consequently increase, and in process of time all the lands would be in possession of the clergy.

It might have been supposed, that the principles alone of the great charter of the realm would have held the people in awe, and have induced them to despise and reject all strict interpretation of the letter: but even this was not powerful enough to resist the ingenuity of these votaries to monastic subtlety; they were placed in a situation wherein they knew themselves to be protected from danger, so long as they held the consciences of men, and from whence they could command obedience to their decrees, as lords over the vassals of their feudal seignories! As the foregoing clause in the great charter had put an end to their concerted forfeitures, they had contrived leases for long periods (which first introduced those extensive terms for five hundred and a thousand years, or more, to attend the inheritance so frequent in conveyances): the king ma-

2 Bl. Com. 270.

turely

turely considered the grievance complained of, proposed a new law to his parliament, which they received with joy, and thus the legislature were induced to interpose by the statute *De Religiosis*, anno 1279. 7 Edw. 1. st. 2.

The statute recites, "That it had been of late provided, "that religious men should not enter into the fees of any, "*without* licence and will of the chief lord, of whom such "fees be holden immediately; and notwithstanding such "religious men have entered as well into their own fees, "as into the fees of other men, approprying and buying "them, and sometime receiving them of the gift of "others, whereby the services that are due of such fees, "and which at the beginning were provided for the de- "fence of the realm, are wrongfully withdrawn, and the "chief lords to leese their escheats of the same. It is "enacted in substance as follows: That no person, reli- "gious or other, shall buy or sell, by color of gift, or lease, "or otherwise, or receive by reason of any other title, any "lands or tenements, or by any other craft will appropre "to himself under pain of forfeiture of same, whereby said "lands may come into *mortmain*. The lord of the fee shall "enter such lands within a year after such alienation, and "hold the same in fee as an inheritance. If he neglect to "enter, then the next chief lord immediate may enter in "six months then next, and so in succession. In default "of their entry for one year, the lands shall fall to the "crown, saving due services to the chief lord of the "fee."

1 Roll. 154, 7. 457.
2 Roll. 170. Bro. Mortm. 15-48.
50 E. 3, c. 22
13 Co. Lit. 2 b.
15 E. 4. c. 13.
Fitz. Formedon, 87.
2 Bulst. 187.
3 Bulst. 45.

Enforced and amended by 13 Ed. 1. st. 1. c. 32. 18 Ed. 1. st. 1. c. 3. 34 Ed. 1. st. 3.

As the pope and the clergy mutually supported each other, in endeavouring to establish a permanent supremacy in the papal throne; this act was one of the most effectual means to oppose them both, by withstanding the one, and checking the growth of the other; it was a fatal blow to the clergy, whose ambition urged them to grasp the universal dominion over public property; and

4 Rapin, 9. 8vo edit.

it

it likewise proved as prejudicial to the Pope, since no bounds could be set to the power of the clergy, without lessening that of the court of Rome.

Fuller's Church Hist. b.3, p.77.

The great power which the Pope had acquired in England arose from the numerous monasteries which had been erected in all parts of the island, which not only increased daily in wealth, but were, with all their territories, entirely at his devotion. If posterity had continued to build and endow religious houses at the rate they were established in the reign of Edward I. all England, says *Fuller*, would in a short time have turned one entire and continued monastery: and the inhabitants thereof become either friars or founders. Such alienation of lands in mortmain, settled on monasteries, afforded neither wards, marriages, reliefs, nor knights' service, for the defence of the realm; in a word, enriched private coffers, and impoverished the public exchequer; wherefore he restrained such unlimited donatives.

The king's act was ignorantly esteemed new, strange, and unprecedented; whereas, in former times, foreign princes had done the same. We find some countenance for it in Scripture, when *Moses*, by proclamation, restrained the overflowing bounty of the people to the tabernacle; and in the primitive times, *Theodosius*, the Emperor, although favourable to the clergy, made a law of *amortisation* to moderate the popular bounty to the church. Yet *Jerome* complained of it to *Nepotian* thus: "I am ashamed to say it; the priests of idols, stage-players, coachmen, and common harlots, are made capable of inheritance, and receive legacies: only ministers of the gospel and monks are barred by law thus to do, and that not by persecutors, but by christian princes; concluding, neither do complain of the law, but I am sorry we have deserved to have such a law made against us."

Exod. 36. 6.

St. Ambrose, in his 31st Epistle, expressed much anger on the same occasion, out of his zeal for the church.

From the period of Edward's act, the decline of abbeys may be dated; yet the act did not ruin, but regulate; not destroy, but direct well-grounded liberality, that bounty to some might not be injury to others. This act is said further to have been made with the advice of Archbishop *Peckham*, Archbishop *Wickwane*, a great scholar, and Bishop *Beake*, of Durham, the richest and proudest of that place. These, though reluctantly, with many others, consented to this act, and to make them some amends, the king not long after favourably stated what causes should be of spiritual cognizance by the statute of *circumspecte agatis*. Thus it appears that Edward I. was the first christian prince who passed a statute of mortmain, and prevented by law the clergy from making new acquisitions of lands, which, by the ecclesiastical canons, they were for ever prohibited from alienating. The opposition between his maxims, with regard to the nobility and to the ecclesiastics, lead us, says Mr. Hume, to conjecture, that it was only by chance he passed the beneficial statute of mortmain, and that his sole object was to maintain the number of knights' fees, and to prevent the superiors from being defrauded of the profits of wardship, marriage, livery, and other sinecures arising from the feudal tenures. This is, indeed, the reason assigned in the statute itself, and appears to have been his real object in enacting it. The author of the Annals of *Waverly* ascribes this act chiefly to the King's anxiety for maintaining the military force of the kingdom, but adds, that he was mistaken in his purpose; for that the Amalekites were overcome more by the prayers of Moses than by the sword of the Israelites. The statute of mortmain was often afterwards evaded by the invention of *uses*.

13 Edw. 1.

P. 234—M. West, p. 409. 2 Hume, 322.

Co. Lit. 2 b. Upon this statute of 7 Edward I. it was held by Sir Edward Coke, that if any *sole corporation*, or aggregate of many, either ecclesiastical or temporal (for the words of the statute, 7 *Edward I. de religiosis*, are, *si quis religiosus vel alius*) purchased lands or tenements in fee, they had capacity to take, but not to retain, (unless they had a sufficient licence), for within the year after the alienation the next lord of the fee might enter, and if he did not, then the next immediate lord from time to time to have half a year, and for default of all the mesne lords, then the king to have the land so aliened for ever; which was to be understood of such inheritance as might be holden; but if such inheritance as were not holden, as villains, rent charges, commons, and the like, the king had them presently by a favourable interpretation of the statute. An annuity granted to them was held not to be in mortmain, for it charged the person only. Formerly, alienations of charter, or college, or hospital lands, were

C. Lit. 43. so far restrained as that their leases were avoided; and it has been always held, that they cannot alienate either to the crown, or to any person, without authority of the legislature.

It should seem as if the last act would have prevented all new devises, but as it extended only to gifts and conveyances *between parties*, religious men now began to

2 Inst. 75. 2 Bl. Com. 271. 2 Burn, Eccl. Law, 472. set up a fictitious title to the land, and by bringing an action against the tenant, who by collusion suffered a judgment by default, they entered, and so defeated the statute. (This is the origin of modern recoveries, the great assurance of the kingdom.)

13 Edw. 1. c. 32 But to prevent so glaring an abuse of the legislative power, it was in such cases ordained by a subsequent

2 Inst. 431. statute, that a jury should try the right of the parties, and if it should be proved that the religious house had no

no right, then the lands should be subject to the above forfeiture: and the like provision was made to prevent the additional artifices of the tenants setting up crosses on their lands (the badges of knights templars, and hospitallers), in order to protect them from the feodal demands of their lords, by virtue of the privileges annexed to those religious and military orders.

The succeeding statute of *Quia emptores* abolished all subinfeodations, and allowed men to alienate their lands to be holden of their next immediate lord; and a proviso was inserted, to prevent any future evasions, that this should not extend to authorise any kind of alienation in *mortmain*. 18 Edw. 1. st. 1. c. 3. 2 Inst. 501.

In a very few years afterwards the legislature was obliged again to interrupt the ingenuity of the sacred Conclave, and to revive the ancient authority of the crown, in granting licence to amortize lands; and an act was passed establishing a mode of application for such consent, by writ of *Ad quod damnum*, which lay from the Court of Chancery, to any one who required the king's licence for such alienation; which was directed to the escheator, "to enquire what damage would ensue to the "king, or unto other persons, if the king should grant "such licence;" and upon the return, the king was to give leave to alienè in *mortmain*: but even this licence was further restrained (as no doubt the process soon became a mere matter of form) by a new statute, enacting, "That even this licence should be ineffectual without "the consent of the mesne or intermediate lords."—*De apportis religiosorum*. 27 Ed. 1. st. 2. F. N. B. 222. A. D. 1307. 35 Edw. 1. st. 1.

The parliamentary measures adopted by Edward III. in the 17th year of his reign, against the encroachments of the college of Rome, are retained in the ancient records of that reign. *Stratford*, Archbishop of Canterbury, is supposed to have been the author of the proceedings A. D. 1343.

then adopted. He had been an active and useful minister of Edward III.; but having two years before been involved in a quarrel with his sovereign, he is believed to have brought forward those measures, partly that he might the more fully reinstate himself in the favour of the king, and partly, perhaps, in conformity to his character and duties as primate of England; that he might shut out the enormous influx of foreigners into the benefices of the English church, preventing the regular and wholesome instruction of the people; that he might maintain the purity of its ancient constitution, as to the election or nomination of its ministers; that he might prevent its revenues from being thus injuriously conveyed into foreign countries. By this advice the parliament was instigated to send for the act of the last year of Edward I. from *Carlisle*, and to re-enact its clauses against provisions and appeals.

Cot. 17 Ed. 3.

In the year following (1344) it having been remarked, that the injunctions of this statute had not been accompanied by penalties; an amending act was introduced, subjecting those who transgressed it to the pains of *outlawry*, &c. The purposes of this law were somewhat reinforced by the circumstance, that the reigning pope was a Frenchman, and was conceived to adhere to the king's enemies in the war then depending for the claim of Edward III. to the crown of France. Yet it sufficiently appears, from the frequent agitation of the subject in parliament, that its execution was partial and irregular. The re-enaction of the act against the pope's nomination to benefices, and the appeals carried to Rome, commonly called the statute of *provisors*, and of the act of penalties against offenders in these points, called the statute of *præmunire*, from which these laws in our statute-book derive their date, took place in the years 1351 and 1353 respectively.

25 Edw. 3. st. 6.
27 Edw. 3. st. 1. c. 1.

It

It is certain, that when the people saw the legislature so attentive to repress the growing accumulations of the hierarchy, there might be grounds for designing men to disturb both them and their devotees in such possessions, which they could discover to have been obtained without all the forms which the foregoing restrictions required; it is not unlikely, these informations increased so fast as to alarm, and, perhaps, so successfully as to abridge, the monasteries of some of their newly acquired temporalties; wherefore they seem to have procured an act which indemnified and released them on an impeachment, if they could produce the royal charter of licence, the inquest on the writ of Ad quod damnum, or fine; and if they could not sufficiently shew that they entered by due process, after such licence granted, then "that they should be well received to make convenient fine for the same." 18 Edw. 3. sta. 3. c. 3.

The next invention to elude all these restrictions was, to procure persons to take the lands in their own names, and then declare the same to be for the only use of certain monasteries, gilds, or fraternities; and also to purchase and dedicate large tracts of land adjoining to churches, as churchyards. An act to subvert these pretended uses (which were the origin of the modern declarations of trust) was accordingly passed in the reign of Richard II. which amortized all such possessions, and rendered them forfeitable; and declared all cities, boroughs, towns, guilds, and fraternities, as being perpetual, under the same disabilities of *mortmain* as religious houses. 3 Hume, 56. 15 R. 2 c. 5,

It was the custom, at this period of our history, for the sheriffs of every county to hold congregational courts twice a year, for the decision of causes ecclesiastical, criminal, and civil, in which the bishops also presided. From what has already been related, it is easy to conceive 4 Inst. c. 88, p. 259. Sharp's Account of the ancient Tithings, p. 69, 70.

to what encroachments episcopal authority had gradually aspired and arisen at that time; but it did not stop here; for in order to attain a right of judging alone in all matters ecclesiastical, according to causes and decretals *unknown to the people*, the clergy set up a fictitious
2 Rich. 2. charter, said to have been granted them by William the Conqueror, but never known till then, which was three hundred years after the demise of that prince, and which in the weak and confused reign of Richard II. they procured to be enrolled; thus assuming a self-erected power of sitting in their consistory courts; which now subsist under no better authority.

The fifteenth century, (from Richard II. to Henry VII.) famous for the councils of Constance and Basil, was likewise famous for the deplorable state of the christian church. The leading articles of the faith were no longer adhered to, and the far greater part of the people's religion was made to consist in pilgrimages, and the idol-worship of the Virgin Mary, saints, and relics. The example of the clergy excited no devotion, the church discipline was relaxed, and the purity of the gospel was forgotten or despised: temporal advantages were the sole pursuit of the teachers of the christian faith. England was in the same state with the rest of Europe. The people were extremely desirous of a reformation of divers abuses which had crept into the church; but the clergy opposed all attempts at a reform, because no change could be made but to their prejudice; and the kings made religion subservient to their interests. When they imagined they stood in need of the clergy, they found ways and means enough to evade the people's demands: but when the parliament's good-will was re-
6 Rapin, 454, 479, 484. quisite, they assented to such statutes as served to curb the encroachments of the pope and the clergy.

Notwithstanding all the complaints which the English

lish had frequently carried to the court of Rome about her continual encroachments, and notwithstanding the precautions which several parliaments had taken to screen themselves from her usurpations, the popes did not abate the least of their pretensions; upon every occasion that offered they made no scruple to act contrary to the statutes of the English parliament, and to assert their apostolic power, without troubling themselves whether they prejudiced the king or his subjects. The parliament, willing to remedy these abuses, passed an act against purchasing dispensations from payment of tythe; and another against provisions of exemption from the jurisdiction of the bishops; but these were ineffectual; for the fulness of the apostolic power again exempted the monks from any observance of these statutes; and this roused the parliament, and the penalties of the statute of *præmunire* were added to their former acts.*

In 1523, Cardinal Wolsey, the favourite and minister of Henry VIII. had raised his power at court so high, that his influence carried him above all care or solicitude for the welfare of the people. His arrogance surpassed the bounds of his own interest, and at length produced his fall. To perpetuate his name, he formed a project, for which he afterwards procured the pope's bull, "to

* In the reign of Henry V. anno 1404, and 1414, two unsuccessful attempts were made by the commons, to reduce the wealth of the clergy. But the latter ended more effectually than the former, in a proposal of delivering up to the king, through zeal and affection (professed to be more sincere than that of the commons), the *alien priories*, which being one hundred and ten in number, were possessed of lands that would considerably increase the revenues of the crown. The king seems to have judged it most prudent to take what the clergy offered of their own accord, and therefore accepted the proposal, and the act passed without any opposition.

"suppress

"suppress as many monasteries as he pleased, to the "amount of 3000 ducats a year," in order to transfer their revenues to two colleges he had intention to found, one at Oxford, and another at Ipswich, the place of his birth, in order to fit students for the former. But although the cardinal had exerted every power to establish these colleges, yet the king was deaf to all his entreaties for the preservation of them, and in the general confiscation which afterwards distinguished the mournful annals of the church, their endowments were vested in the hands of the crown, and the name of their founder sunk in obscurity.

† Rapin, 268, 277, 418.

Anno 1529.

21 Hen. 8. c. 13. In 1529, Henry restrained the clergy from taking any lands to farm, and from buying and selling any merchandize, except such as belonged to their spiritual person or glebe; and all spiritual persons of any religious house, having lands, or other yearly profits in right thereof, of the yearly value of 800 marks, might occupy the same to the advantage and maintenance of their house only, and not having sufficient, might take in farm other lands, and buy and sell corn and cattle, for the only manurage, tillage, and pasturage, of such farms, so that the profit should be appropriated to the house alone.

The See of Rome had long been engaged in very serious contests with several of the states of Europe; the assumed supremacy she had constantly exerted over England became insupportable. The writings of Martin Luther had been industriously and successfully circulated in every part of the island, and the people now began to entertain very different opinions of religion, to those of their ancestors, especially with regard to the papal authority. Pope Clement VII. did not take the means to preserve any conciliation, but persisting in his measures, and

and also in his objection to the king's divorce from queen Catharine, the interest of the king and the people thus became the same. The pope afterwards signified his desire of accommodation by dispensation, which the king resolved to reject; and this produced the first blow to the papal authority—a proclamation, forbidding, under severe penalties, the receiving any bull from Rome contrary to the prerogatives of the crown. The consequent fall of Wolsey was grounded on his exercising his legatine authority without the king's licence; and of his disposing, as legate, of several benefices, contrary to the statutes of *provisors* and *præmunire*: the whole body of the clergy fell likewise under the same predicament; they were obliged to sue to the crown for a pardon, which was granted at the expence of 100,000l. The thunders of the Vatican were now heard with contempt, and the crown of England at length began to feel itself released from an unjust bondage, and subject to no other control than the laws of the realm.

The grant of lands to *superstitious uses*, such as for masses to be said for the soul of the donor, when he should quit the present stage of existence, and the like; was the most fertile invention to increase the power of the clergy (and a principal support of the arguments in favour of purgatory): the heads of the papal priesthood luxuriously slumbered upon large bequests for this purpose, while their inferior brethren spread their tattered garments over the graves of departed visionaries, and exhausted their breath in vain repetitions for the safety of those souls for whom they felt very little regard, and less pious concern.

The former statutes had as yet applied only to corporate bodies; it became now essential to preserve whole families from ruin, by forbidding such acts of selfish devotion;

devotion; and with this prohibition, the glorious and heavenly Reformation first dawned upon England. Henry the Eighth, however tyrannical and self-willed in all his pursuits, and whatever sinister views might lead him in this great cause, yet seems to have been blessed with an inspired firmness, that bore him on amid all the crowd of public prejudice; the arts of papal priestcraft; the terrors, to him vain terrors, of the hierarchy; and the multitudes of his wondering people, then deeply shackled by the fetters of superstition, and the influence, almost unshaken, of the church of Rome! He thus began by attacking men in their private and internal principles, and the priesthood in this chief bond which preserved their power.

23 Hen. 8. c. 10 Anno 1531.

The new act abolished these purgatorial services: it recites, "that by such sales and conveyances made of "trust of lands to the use of churches, fraternities, or "brotherhoods, erected and made of devotion, or by "consent of the people without any corporation; or to "the use and intent to have obits perpetual, or a con-"tinual service of a priest for ever, or for threescore or "fourscore years (supposing, no doubt, that their pur-"gatorial state might by that time be concluded), out of "the issues of land charged therewith, that as much loss "and inconvenience happened, and the same were as "prejudicial as where lands were aliened in *mortmain*."

"Wherefore all such uses, by what name, nature, or "quality they were called, were from thenceforth de-"clared to be utterly void. But this is saved in some "degree by a proviso, authorizing any person seized of "lands to his own use, or having feoffees of any trust of "lands to his use, to make or devise the same for the "above purposes, so as the same do not continue for a "longer term than twenty years.

"All

"All devices and contrived assurances to defraud the "statute are declared void; and it is declared that the "act shall always be interpreted and expounded as be- "neficially as may be to the destruction and utter avoid- "ing of such uses; but not to prejudice the right or "custom any corporation might then hold to devise "lands in *mortmain*."

Superstitious uses were the object which this statute was designed to overthrow; but the same propensity remaining among the people, happily directed by a better judgment, they created trusts for the endowment of free schools, seminaries of education, and stipendiary reliefs to the poor and aged; a practice which the law certainly favoured, had the design ever been put in practice, by adjudging it not within the restrictions of the *last* cited statute, which was expounded to be intended only to subvert the progress of superstition.

Cro. El. 288. 1 Co. 26. Gibs. 645.

In 1532, these measures were further extended, by an act which established the supremacy of the three estates of the realm, in all causes spiritual as well as temporal; and decreed the penalties of præmunire on all who should prefer appeals to the see of Rome, and appointed the judicature of the ecclesiastical court. The pope's earnest remonstrances against the king's divorce seem to have been one great cause of the general abolition of his authority in England, in the acts of exemption from the annates, appointing bishops, peterpence, procurations, delegations, expedition of bulls, and dispensations; the very name of the pope was, by proclamation, in 1534, ordered to be struck out of all books, that the remembrance of it might, if possible, be lost for ever. In the mean while, as the people were daily corrupted by the monks, who insinuated that the king was going to overturn all religion; he resolved to take every possible precaution to prevent the pernicious designs of these dangerous

24 H. 8. c. 12.

Rapin.

gerous adversaries. To that end, the suppression of all monasteries was suggested, which the king resolved to effect by degrees. He began by ordering visitations, whereby he should discover their revenues and practices. The monks, conscious of their irregularities, were easily terrified by the threats of their visitors, into a surrender of their houses to the hands of the king: the visitations unravelled to open day a series of debauchery, corruption, wickedness, and abominations (says Burnet) "equal "to any that were in Sodom;" and the king gave them leave to quit their houses of mock sanctity. Henry tried his success with his nephew James, king of Scotland, but found him still an adherent to the see of Rome. In 1535, he proceeded in his plan, by procuring an act to abolish all the lesser monasteries, whose revenues did not amount to more than 200l. and this was followed by an order for publishing the holy scriptures in English. The pope solicited a reconciliation, which was rejected, and this was followed by an act in 1536, incurring the penalties of præmunire on all who endeavoured to restore his authority in England.*

27 H. 8. c. 28.

28 H. 8. c. 16.

All these measures produced innumerable discontents among the clergy, the monks, and the people. An insurrection followed, which was happily suppressed; but it served only to facilitate the ruin of monastic pride; to which cause the king easily attributed the danger to which he had been exposed, and therefore

* Alms of ploughlands, eleemosyna carucarum, or eleemosyna pro aratrix, was a tax anciently paid for the benefit of the poor, at the rate of a penny for each ploughland.

Alms of the king denote what was otherwise called peterpence, or alms of St. Peter.

The erecting an alms-chest in any church was introduced by an act of 27 Henry VIII. and is enjoined by the book of canons, as also the manner of distributing what is thus collected among the poor of the parish.

resolved

resolved upon the suppression of all the monasteries, and for that purpose appointed, as before, another strict visitation.

The gross and impious abuses there discovered were immediately published by the king's command; the *forged relics*, and *secret springs*, which moved images, said to be moved by the effect of a divine power, were broken down; the visionary relief attributed by every deluded votary, who threw himself at their feet, began to be no longer felt; and the impositions and *pious frauds* practised by the priests upon the credulity of the people were universally exposed. The shrine of Becket shared the common fate. It is said, that in one year the offerings upon the altar of Christ did not amount to one penny; those at the altar of the Virgin, to 4l. 1s. 8d. but those at the shrine of Becket, who was accounted the greatest saint in heaven, to 954l. 6s. 3d. Anno 1537.

Whatever might have been the views of Henry, to whom avarice has been assigned, with apparent justice; and to whose ingenuity is also attributed a subtle report that an invasion was expected, or a continental war, formed by the pope, to involve him in new distractions, as well abroad as at home; it is certain he made these the motives for suppressing religious houses, and appropriating some of their immense riches to the charges of the state, instead of raising a subsidy upon the people.

The act of 1539 granted the lands of religious houses to the king, which were supposed to have been voluntarily surrendered to him; an artifice which he adopted to blunt the edge of cruelty, which was imputed to him by the suppression; and indeed the extravagant devotion of this parliament to the will of the monarch, particularly testified in the act for enlarging his royal prerogative, were additional distresses to the church of anti- 31 H. 8. c. 13.

christ,

christ. But though the sums acquired by this suppression amounted to 1,600,000l. the king employed only 8000l. per annum in founding six new bishopricks, and establishing canons in some of the old cathedrals: the rest of the money was injudiciously lavished away.*

In 1540, the order of St. John of Jerusalem, since known by the name of the Knights of Malta, shared the fate of their brethren in the faith. Their obstinate dependence on the pope and the emperor was the cause or pretence of their ruin. The parliament gave the king all their lands, out of which he allowed them 3000l. per annum, for their maintenance.

1542. The king (Henry VIII.) made no demand of any subsidy from the parliament; but he found means of enriching his exchequer from another quarter: he took further steps towards the dissolution of colleges, hospitals, and other foundations of that nature. The courtiers had been practising on the presidents and governors to make a surrender of their revenues to the king, and they had been successful with eight of them. But there was an obstacle to their further progress; it had been proved by the local statutes of most of these foundations, that no president, or any number of fellows, could consent to such a deed without the unanimous vote of all the fellows—and this vote was not easily obtained. All such statutes were annulled by parliament, and the revenues of those houses were now exposed to the rapacity of the king and his favourites. The church had been so long their prey, that nobody was surprised at

* The king projected a noble design of a college, for the study of the affairs of government, the laws, history, &c. where all the duties of the statesman were to be the chief objects of pursuit: and Sir N. Bacon, Thomas Denton, and Robert Cary, actually drew up a full project of the nature and orders of such a house, which were presented to the king; but it does not appear why so excellent a plan became abortive.—Burnet.

any

any new inroads made upon her. From the regular, Henry now proceeded to make devastations on the secular clergy. He extorted from many of the bishops a surrender of chapter lands, and by this device, adds Mr. Hume, he pillaged the sees of Canterbury, York, and London, and enriched his greedy parasites and flatterers with their spoils.

4 Hume, 221.

One can scarcely find greater signs of a slavish attachment to the prince's will, than seemed to pervade the parliament, and the people also, at this period. The pope's infallibility was transferred by an act of parliament to the crown, under a colourable limitation in favour of the laws of the realm; but several persons, who still avowed their adherence to the old religion, and denied the king's supremacy, suffered for their perseverance at the stake.

The conduct of the parties gave ample occasion to the measures adopted for their fall; for after the early incorporation of divers chapels, colleges, seminaries, religious houses, hospitals, and the like, the donors, or pretended donors and founders, through avarice and of their own authority, entered into the lands and houses thereof, and expelled the priests and officers, and took upon themselves the receipt of the rents and profits, and appropriated them to their own use; and some of the officers and governors by collusion sold the lands belonging thereto, and made leases for lives or years of the whole foundations, without reserving the usual rent; and others suffered recoveries of their possessions so gained, whereby the institutions became dissolved by patrons, or pretended patrons without licence; wherefore in 1545 they were all vested by statute in the crown, together with all lands granted for finding a priest for ever; or if for a term, then during that term.

'8 Edw. 1. st. 1. c. 41. 1285.
Cro. Car. 248. 281.
Lane, 113, 115.
Dyer, 81, 267, 287, 313
2 Co. 49.
1 Roll. 202, 357, 152, 417.
2 Roll. 206, 160.
4 Co. 104.
1 Co. 47. Cro. El. 799, 449.
Moor, 263, 413, 693, 865.
Pl. 960, 129.
3 Leon. 114.
Cro Ja. 51.
Hob. 123.
Golds. 93.
1 Bulst. 190.
37 H. 8 c. 4. 15.
1 Edw 6. c. 14.
3 Bulst. 151.
1 Leon. 38.
Plowd. 177.
Hetley, 28, 41.

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In the same year most part of the colleges, collegiate churches, and hospitals, surrendered to the king by acts and deeds, seemingly voluntary, but were no more so than those of the abbots and priors: which surrenders were afterwards confirmed by an act of parliament; but the two universities of Oxford and Cambridge claimed and received the king's protection, which was extended to a continuation of their ancient privileges. 1546.

To co-operate in the great work of the reformation, and to prepare the way for a perpetual establishment of the protestant cause, it became necessary for the legislature to give some material encouragement to the liberality of opulent men, who felt the desire of signalizing their names, and shewing an example of benevolence, that might suppress the vigilance of avarice or selfish luxury: and for this good purpose it was necessary to relax in some measure from the severity which the parliament had assumed in the restraints of the *mortmain* acts; and when, after the demise of Henry, they saw the new doctrines of the church sustained by the regency, during the minority of a prince of exalted character, transcendent abilities, and acknowledged resolution to support the protestant faith; while the people were rapidly shaking off the yoke of religious slavery, under which they so long had groaned; the crown seems to have re-assumed the power formerly given to its prerogative, of granting licences to alienate lands in *mortmain*, and joined with the legislature in diverting their papal purposes into those of protestant and charitable uses; and such wholesome establishments were deemed the most effectual instruments to perpetuate among the people the doctrines and milder precepts of the reformed church. Edw. 6. 18 Ed. 3, st. 3, c. 3.

But

But this was accompanied by an act, which totally overturned all the expiring hopes of papal influence. The chantries, or small chapels, generally to be seen in old cathedrals, round the body of the church, had been erected by licence from the crown, without the ordinary, who had no concern therein; sums of money being usually bequeathed for their needful repair, and for a stipend to a priest, for the superstitious purposes already mentioned, of constant masses for the soul of the donor deceased, obits, anniversaries, and the like: the present act seems to have resumed the subject where the former act of Henry VIII. had left it, and totally abolished, without exception, the whole of this remaining branch of crafty fanaticism; and vested all lands and property wholly *devised* for such purposes in the crown; but such as were granted *only for a term of years* were given again to the heir at law at the expiration of that period. 1 Edw. 6. c. xiv. A. D. 1547. 28 H. 8. c. x.

These chantry lands were sold to provide revenues for six newly created lords of the regency, during the young king's minority; but the scheme of the reformation went on under their protectorship. The executors of the late king also wanted these lands to pay his debts and legacies, while the nobility thirsted after them for their own emolument. The parliament of England kept pace with the emperor in carrying on the designs of the reformation. The acts of 1548, for the uniformity of the church liturgy, and the marriage of priests, sufficiently proved to the people that the wishes of the late king were wholly complied with; but the Princess Mary always took some occasion to signify her disapprobation of these measures, which she afterwards more openly avowed by her cruelty and bigotry. Rapin. 2 and 3 Ed. 6. c. 1. c. 21.

It is a mistake to say that a superstitious use is to be disposed of by the crown. By the statute of 1 *Ed. VI.* c. 14. such property is given to the crown, not to be

disposed of in charity; but that statute applied only to superstitious uses then existing; those since created are merely void. *See de Garcin* v. *Lawson.*

4 Ves. jun. 433.

In cases that are not considered here as superstitious uses, the king has the disposal, because the charity pointed out cannot be carried into effect. So in every case of a general gift to charity, without pointing to a particular one, the crown has the right of disposition. The true distinction upon this point is, that where the charity is sufficiently described, this court will carry it into effect: but where there is a more general gift to a charity, without any description of objects, the court of chancery does not create a charity, it falls to be disposed of by the crown by sign manual; and is not a subject of administration in that court.

7 Ves. jun. 54.

At one period something like a rule was established, that when the gift is to charity generally, it belongs to the king to point out the particular charity, as to declare, what charity should take, as a branch of the prerogative: but where the particular charity was pointed out, it devolved upon the court. There is no case in which that is much considered, except the *Attorney* v. *Matthews*, in which it seems the direct point.

2 Lev. 167.

In subsequent cases, the disposition has been sometimes in one way, sometimes in the other; and it is impossible to reconcile them. Some of them depart from the rule; but the point was not raised, and brought fairly to decision in any one case.

7 Ves. jun. 64.

7 Ves. jun. 490. *Cary* v. *Adams*, 1802.

G. Cary, a Roman catholic, bequeathed all the residue for educating and bringing up poor children in the Roman catholic faith, &c.

Against which bequest it was urged, that this was a *superstitious use*, forbidden by the Statute of 1 Ed. VI. c. 14. It is stated in all the abridgments, that wherever there is a disposition for a superstitious use, it goes to the

the crown. That probably arose from a mistake of the law, arising from a passage in *Duke*, (Char. Uses, 105). The statute appears plainly to have a retrospect to gifts made before, and has no provision applicable to those subsequent, as to forfeiture, though clearly void; and it cannot be maintained upon the statute, that property given at this time to a superstitious use shall be forfeited. It is clear from the statute that this was not a charitable, but a superstitious use: but all the expressions are retrospective merely.

It was contended for the *Attorney-General*, that the right of the crown is established by a great number of decisions, many of which are upon subjects that arose long since the act. Superstitious uses are void not only by the statute, but by the general policy of the law, &c.

It was mentioned that *Lord Thurlow* held a purpose to educate *Jews* a good charity. *Isaac* v. *Gompertz.* 7 Ves. 494.

The master of the rolls, *Sir W. Grant*, said, that the residue cannot be applied according to the will is certain. The Roman catholic religion has received a considerable degree of toleration by the Statute 31 George III. c. 32. Yet there is a provision in that act, that all dispositions before considered unlawful shall continue to be, and be deemed so. There is no doubt that a disposition for this purpose was unlawful before that time. The consequence of its being void, if authority was out of the question, would be intestacy; that the gift being so void must be considered as no gift. But that is contradicted by authorities without number. According to them, whenever a testator is disposed to be charitable in his own way, and upon his own principles, we are not to content ourselves with disappointing his intentions, if disapproved by us, but we are to make him charitable in our way, and upon our principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in

objects not only not within his intention, but wholly adverse to it, it is not for me to attempt to overturn the settled law and practice; according to which, charitable bequests, void as to one object, may be appropriated to another.

But in this case, founding himself upon the expression of Lord Hardwicke, in *De Costa* v. *De Pas**, he added, This is so wholly void, as not to be applicable to any other purpose. According to that statement, to entitle the heir or next of kin, it is requisite, not only that the devise is to a superstitious use, but to such as is made void by the statute. There is no statute making superstitious uses void generally. The Statute of Edward VI. c. 14. relates only to superstitious uses of a particular description then existing. The Statute of 23 Henry VIII. c. 10. relates only to assurances of land to churches and chapels, which if for a longer term than twenty years, it declares absolutely void. The Statute of 1 Geo. I. c. 55. was only temporary. In the *King* v. *Lady Portington*, one of the resolutions is, that the use being superstitious is merely void; and for that reason the king cannot have it; yet, however, it is not so far void as that it shall result to the heir; and therefore the king shall order it to be applied to a proper use. In the *Attorney* v. *Girse*, the case of *Gates* v. *Jones* is mentioned; in which it is said, a charity given to maintain popish priests was applied to other uses by the king, and not to turn to the benefit of the heir. It is unnecessary for me to mention the other well-known cases, in which bequests, void as to the particular objects, but being charitable in their nature, have been applied to other charitable purposes. In the note to *Carlyn* v. *French* of the argument

* See this case, as corrected by the Lord Chancellor from Lord Hardwicke's notes, 7 Ves. jun. 76.

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in *De Garcin* v. *Lawson*, it is said by the counsel for the next of kin, that "the opinion that prevailed in some "cases, particularly *Baxter's case*, that the crown may "appoint, was disapproved by Lord Thurlow in *Mog-* "*gridge* v. *Thackwell*; and in *Attorney* v. *Whorwood*, the "next of kin, upon the foundation of Lord Hardwicke's "opinion, filed a supplemental bill; upon which Lord "Keeper *Henley* declared, that the disposition of the "personal estate, after the death of Mrs. *Scott*, so far "as it was intended for a charitable purpose was void: "and that it would belong to the next of kin: and under "that decree, the next of kin upon the death of Mrs. "Scott, about eight years ago, obtained a transfer of all "the funds." Upon looking at *Attorney* v. *Whorwood*, 1 Ves. 534. it appears the doubt was, whether it was a bequest for a charitable purpose or not; whether any charity was in the intention; for the argument upon the other side was, that this was no devise to a charity. Lord Hardwicke says, "If this trust is no charity, there is no ground for "the information in the name of the *Attorney-General*, "at the relation of the college, on a devise to the college "only; for such information can only be supported on "the foot of a charitable use. On a general devise to "the college, without more, the college being a body "capable of taking, must sue, the *Attorney-General* "having nothing to do with it; and it is only before me "upon that information."

He did not, therefore, see how that case could be an authority, that an illegal but charitable use shall go to the heir or next of kin. Here the use is clearly charitable in its nature, viz. for poor orphan children. What vitiates it is, that they are to be educated in the Roman catholic religion.

He declared the bequest of the residue void: but that it must go to such use as the king should direct. The

Attorney General, therefore, would apply for a sign manual.

Throughout the reign of Edward VI. we meet with acts that were all built on the grand foundation of that of his predecessor, which dissolved the monasteries; tending to the same grand point of effectually subverting the constitutions of the Romish church; the establishment of a revived book of common prayer, and the administration of the sacraments, which restored the truth, and abolished the empty credulity of a transubstantiated symbol; the act for payment of tithes; the permitting the marriage of priests; the abolishing of mass-books, and breaking down of images; all followed each other in a regular succession, and ruined for ever the expiring cause of artifice and idolatry. But though the legislature has ever been careful to restrain monkish artifice, yet monasteries and *religious men*, as the term was, were always under its watchful protection; but towards their dissolution, the parliament seems, with unparalleled assiduity, to have concerted and effected their destruction. And exclusive of the grasp of power and wealth which at all times distinguished the leading character of Henry VIII. the extreme dissoluteness of manners of these *religious men*, who became at last unbounded in their excesses, called aloud for the interposition of a wise and virtuous government. It appears that, so early as in the reign of Edward I. it was customary for the monks to give great entertainments, even to the injury of the revenues of their house—that the abbots of St. Austin, St. Benedict, and other *sacred* orders, presiding over a number of smaller houses, had levied very exorbitant fines and tributes upon them, whereby "the service of God was "diminished, and they were rendered unable to give "alms to the poor, sick, and feeble; and the healths of "the living, and souls of the dead, were miserably de-

"frauded,

1 Edw. 6. c. 1. 2 and 3 Edw. 6. c. 1.—5 and 6 Edw. 6. c. 1. 2 and 3 Edw. 6. c. 13.

Ibid. c. 21. 5 and 6 Edw. 6. c 12.—3 and 4 Edw. 6. c. 10.

9 H. 3. c. 5. 32 H. 3. c. 20. and 28.

8 Edw. 1. c. 1.

35 Edw. 1. st. 1. c. 1.

"frauded, and hospitable alms-giving and other godly "deeds had ceased." These abuses were at first only restrained, but they furnished additional and powerful arguments for the future abolition of the whole seminaries and all obedience to the see of Rome.

Among the multitudes who had outwardly declared themselves protestants, there were abundance of persons who were so only in name; some halted still between the two professions, others were papists in their hearts; and very many, having regard only to temporal advantages, had embraced the reformation merely to make their fortunes: the fewest in number were those who were truly convinced of the tenets of the new religion: all were united against the Duke of Northumberland, who succeeded the Earl of Hertford in the protectorship, and whose tyrannical government had already been felt too severely, and who was in all probability to have been the prime minister to Jane Queen of Scotland.—All this was most flattering to the hopes of Mary, who promised to make no change in religion; and she was soon after proclaimed queen, amid the acclamations of the whole deluded nation.

But as soon soon as she ascended the throne, a new A. D. 1558.
scene of affairs seems to have staggered the very promising hopes which had been raised from the preceding acts; her artful proclamation, the restoration of several bishops who had been deposed, the silence of the court at the performance of the Romish formularies in many places contrary to the late statutes, and some injustices suffered to be committed against those who had favoured the reformation, gave new vigour to the papists, and struck an alarm throughout the realm, that divided the minds and the actions of men. She began her designs of restoring the papacy, by affecting to secure the abbey-lands to their possessors, and more especially by his

marriage with Philip of Spain. In the 26th of Henry VIII. and several subsequent statutes, first-fruits and tenths were granted out of every benefice towards the revenue of the crown; but Mary, at her accession, rescinded those acts and all augmentations: and after the arrival of Cardinal Pole, the servants of the crown readily bent the knee to that holy missionary; and the parliament, by a solemn renunciation and repeal of all the former acts which had passed during the *time of the schism*, as they styled the reformation, allowed all persons to alienate their lands in *mortmain* for *twenty years*; rigorously punished the visitors appointed by Henry VIII.; restored to several of the monasteries many of their effects; repaired the old and built new ones; introduced again those destructive tenets which the wisdom of her late predecessors had endeavoured to eradicate; and stained the pure raiment of sincere and truly christian fortitude with the blood of its pious adherents!

1 and 2. P. and Mary, c. 8.

Sect. 51.

Dyer, 255. 11 Co. 72. Hob. 123. 1 Roll. 166, 418.

The then parliament, as full of zeal for the crown as the former had been for the reformed church, gave ample powers to the queen, and to the legate *de latere*, to establish, *by all methods*, the primitive persuasions of her own dogmas; what methods were accordingly taken need not be repeated at this day of religious tranquillity, when feud and phrenzy are alike forgotten*!

But through the mercy of heaven these calamities lasted not long; and the present tranquillity we enjoy may be said to have arisen, as well from the horrors with which every one was then affected by the excesses

* The only act of clemency in that reign was the suffering two refugees, Peter Martyr, and a popish professor, John à Lasco, with a few other foreigners, to quit the kingdom. Mary carried her enormities so high, as to form a plan for the establishment of an inquisition in this country.—In the space of three years 800 martyrs suffered death in the cause of the protestant faith. RAPIN.

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of papal persecution, as also from the persevering and steady measures of Elizabeth, the establisher of our faith, and the glory of England! She began by restoring the ancient jurisdiction of the crown over the estate ecclesiastical and spiritual, and by abolishing all foreign power repugnant thereto; and on this foundation, she built the structure under which the people now assemble to bend their hearts before God! 1 Eliz. c. 1.

She was no sooner seated on the throne, than proposals of marriage were sent over to her from Philip king of Spain, who was desirous of preserving the title of king of England, and the Roman catholic doctrines there; she found herself in some difficulty to reject them, and at the same time to preserve the friendship of several of her allies; and the readiest way that offered to prepare him for her refusal, was, by pushing on the design of changing the ancient religion of England, well imagining that when once this should be effected, it would put an end to his importunity: she therefore renewed the disputations on certain articles of religion, restored the tenths and first-fruits to the crown, and also the unappropriated tithes. The parliament applied its attention to the affairs of religion, appointed the public worship in the vulgar tongue, restored to the crown its supremacy over the church in England, and renewed and confirmed the acts relative to religion passed in the reign of Edward VI. All religious houses founded by Queen Mary were suppressed; Edward's deprivation of popish bishops was declared valid, and all leases made by their successors legal; together with an act for the uniformity of public prayer. A. D. 1558.

In 1559, the parliament seems to have put a final end to all the doubts which had hitherto prevailed, and, notwithstanding many subsequent plots of the papists, firmly established the reformation on the basis which two hundred

hundred and fifty years have since continued to maintain and confirm.

The acts that signalize the reign of Elizabeth, for the establishment of houses for the poor and afflicted, must be deferred till we come to the subject of *charitable uses*, to which they more materially relate, though in some measure they tend to relax the early restraints of the statutes of *mortmain*.

Motives for the Reformation.

It may not be unseasonable, before I proceed further, to offer a few observations on the motives which seem to have actuated those princes, who were more immediately concerned in the devising and completing the great plan of reformation in England; but whatever motives they were, the benefits of the measure should be the daily subject of our gratitude; they were instruments in the hand of Providence, watchful for the future welfare of this country. "Christianity" (says the Rev. John Duncombe, in his preface to the select works of Julian) "is well avenged of its enemies by the very absurdities "which they prefer to its tenets." The pope attempted to lay violent hands not only on the property but the consciences of men; and the protestant faith is thus well avenged of its papal enemies, not only by their absurdities, but by their cruelties and artifices.

Throughout all the plans and schemes which brought about the reformation, it is clearly observable, that religion was not the only motive of that great design:—Henry VIII. had very pressing need of supplies to carry on his continental troubles, in which the pope took an active part against him; the people were not then in such a state as they are in at present, capable of bearing the weight of such a levy as the charges of a great campaign require, and still of supporting the current exigencies of their domestic supplies:—his caprice, his overbearing

bearing and tyrannical disposition, and the difficulties he felt in submitting to the power of the clergy, whose wealth had raised them above subordination to the crown, and various other causes in the confirming and annulling his frequent marriages, and in the disappointment he felt at not being able to extend his dominion in Europe, were all certain motives to induce him to listen to the suggestions of a part of his ministers; some of whom, from more conscientious and pious motives, were, like Cranmer, impressed with a laudable desire of freeing their country from papal arrogance, and of establishing an honest devotion, with tenets less artful and obscure, and more consistent with the spirit of the gospel. That Cranmer was an honest man, and free from any sinister views of self-aggrandizement, all writers agree, and his conduct and his martyrdom eminently testify. Other statesmen might have been led by the sole principles of state policy, and the increase of the public finances; they were useful to the king, who, while he openly applauded the former, discovered and cherished in his heart the views and designs of the latter: and he easily found favour among his people for this grand undertaking, the chief honour of which was attributed to him, since they had long felt the increase of papal oppression, and at the same time saw no other channel of supplying the clergy and the king's needful demands without the ruin of themselves.

It was natural for Henry, who saw the success of his measures beyond his warmest expectations, to provide for a continuation and completion of his design after his demise. He must have reflected with concern on the minority of his son, and his natural jealousy must have added disquietude to his fears of proper guardians for the infant crown. His judgment directed him to such men as had shewn the most interest in conducting his measures

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on the joint principles of religion and policy; and, under their perseverance, he at length contented himself in imagining that his son would one day command all the rich treasures and extensive land-property of the clergy: to acquire their possessions was at once to raise the power of the crown above all further dependence on that ambitious brotherhood: and to these deep-laid schemes the young king succeeded under the protectorship of the Earl of Hertford and five other noblemen, assisted by a select council, who devoted themselves to the vigorous execution of all the wishes and desires of their late master. Edward VI. though a young man of uncommon talents, yet cannot be supposed to have entered so deeply into these measures; but he understood them so far as to conceive their utility, and to express, at his early and lamented death, a concern for their future success.

It is impossible to peruse the annals of the next reign without shuddering at its horrors, and trembling for the fate of religion! But it is the benign principle of truth, that no power can destroy her, though it may extend to stifle her voice for a short time! Mary from her earliest days had been surrounded by papists; and this seems extraordinary, that her father should have been so unmindful of her education in this particular, unless it might arise from his hopes of his son, whose youth might flatter him with length of days, and whose person and abilities might lead him into a marriage with some princess of the same persuasion in which he had been carefully educated. Mary often dissembled while in her father's court, by appearing publicly at the reformed church, but in her private chamber always thought proper to be absolved from such an offence, by receiving high mass from the ministration of persons who watched with jealous fears the vigorous exertions of her father and of her brother's

brother's council. When she ascended the throne, her dissimulation was artfully displayed in a proclamation that she would not change the reformed religion; but as she listened to the proposals of Philip of Spain, while her heart was beating with the exulting hopes of increasing grandeur, she gloried in the prospect of thus gaining a powerful ally, and joining the interest of the court of Rome, by restoring to the ruined monasteries the riches which her father had gathered from them, and by bringing back her wandered flock to the foot of the sacred cross.

Elizabeth, besides the zeal which she always testified, during a long and successful and benevolent reign, for the reformed church, had still other views for regaining to the crown the affection of that part of her subjects whose exertions in the same good cause had been stifled during the cruel reign of her sister Mary; the most persecuting bigot that ever disgraced the annals of political history, or the delicacy of the female character. Elizabeth had a glorious ambition to see her country raised above the assumed and arrogant splendour of her enemies, whose chief power was open to her penetration, which readily exposed and chastised their vain glory. This laudable ambition was not a little augmented by the proposal of marriage from Philip of Spain, the husband of the late queen her sister, which she rejected: nor was it in any degree abated even by the more tender qualifications of unassuming modesty and a charitable piety, that regarded the future as well as the present benefits of her people. If she saw the ill effects of Mary's cruelty, and beheld the odium that spread through all ranks from so flagrant and deserved a cause, she is to be applauded for having taken example, and shunned the evil: when the source is clear, it is commendable to cleanse the channel. If policy be attributed to Elizabeth,

beth, it must be allowed, that her amiable disposition contributed to set before her the enormities of Mary as unprincipled and indefensible. The spirit of the people roused by these crimes, and justly promising themselves better prospects, might have alarmed the queen; for the purposes of her reformation, even at that period, tended more to their good than to the benefit of the crown. The treasures of religious houses had long ago been lavished away, all sinister advantages were then expired, and the great and lasting proofs of her benevolence, which followed the restoration of the new church, are at this day convincing proofs, that whatever motives actuated her predecessors, those of public good directed and prospered the measures of Elizabeth, whom a benign Providence, ever watchful over this country, chose to distinguish with exalted wisdom, in order to complete, under such a monarch, the glorious design of the safety of her people!

CHAPTER III.

OF THE LAW OF CHARITABLE USES, FROM THE REFORMATION UNTIL THE 9 GEO. II. A. D. 1736.

IN the early ages of this country, the people seem to have deemed it necessary for any public benevolent purposes, not only to associate themselves into a company, but to sue to the crown for an act of incorporation; and thus we read of no plans for the benefit of the poor, but such as had opulence and endowment sufficient to erect houses, and form regular societies, vested by royal charter with all the powers and hopes of perpetuity. In modern times, we have seen the benevolence and assiduous exertions of a Howard,* a Hanway,† a Thornton,‡ and many others, affording new and lasting examples of energy in almost every good work, devoting their attention to their own favourite institutions, and uniting with liberal heart and unsparing hand in the most effectual means to drive oppression as well from the shores of Africa as from the loathsome dungeon; to provide for and reclaim the naked and the dissolute; to give industrious occupation to the blind; refuge to the

* Mr. Howard's pursuit was, that of relieving prisons in almost every state in Europe from abuses of needless oppression, filthiness, and pestilence, in which he hazarded his life.

† Mr. Hanway, with Mr. John Thornton, and Mr. Hicks of Humbro', were the founders of the Marine Society; a society which has been espoused from the mechanic in London, up to the crown, the parliament, the chiefs of India, &c.

‡ Mr. Thornton's name and family are to be found in every list and contribution for private and public distress.

destitute;

destitute; safety to the lunatic; and protection or recovery from the malignant ravages of loathsome and fatal disease: the restraints of *mortmain* were no bar to their designs, which they saw could be effected within the limits of mutual agreement and beneficent principles, that need no other aid than that of voluntary contribution to preserve. A few only of these have been since incorporated.

The early practice of obtaining charters must appear, from what has been related on the subject of *mortmain*, to have been pursued as an effectual means of preserving the influence of the Roman faith, by increase of opulence, the possession of lands, and a perpetuity of members of the same persuasion. But such were *ecclesiastical* corporations, being composed of spiritual members. *Lay* corporations are *civil* and *eleemosynary*; the former for a variety of temporal purposes incident to the government; the latter for the distribution of alms and benevolence. To the latter we shall at present confine our inquiries.

As the former, or *civil corporation*, is for public government, it is therefore subject to the common law; but as the latter, or *eleemosynary* corporation, is the creature of its founder, so it is internally governed by its private laws: not that the members of it are exempted from the common law by thus uniting, but the body in general is so; except when they do any act repugnant to the law of the land: the breach of their private laws, or orders, is not a crime cognizable by the common law, unless any such act be extendible into a public wrong. If a general court, for instance, depose an officer, they exert only the power vested in them by their private rules; but if they depose him wrongfully the common law will relieve him, because they have then extended the private powers of the institution too far. Although the king himself be a founder, yet the breach of such statutes

1 Burn Eccl. Law, 419.

Stra. 912.

14 Ves. Jr. 246.

statutes are not crimes against the crown; his power of pardoning is vested in him, as having the executive authority; the crimes he pardons are such as are against the public laws and statutes of the realm; whereas these are in the nature of domestic rules, for the better ordering of private families.

Formerly there were some hospitals that were *corporations aggregate*, as of master, wardens, and their brethren, as the companies of London are at this day; others, where the master or warden had only the estate of inheritance in him, and the brethren or sisters had merely a power to consent to his acts, having college or common seal. (Some of these latter had no seal.) Some of these institutions were eligible, or elective; some donative, and some presentable. 1 Inst. 342.

After the reformation, when seminaries for education and hospitals began to be founded, queen Elizabeth, in the act she procured for restitution of first-fruits to the crown, by a special proviso, shews her regard to religion and humanity; whereby it is declared that "nothing "in the act shall extend to charge any hospital, founded "and used, and the possessions thereof employed to the "relief of poor people, or any school, or the possessions "thereof, with the payment of any tenths or first-fruits." 1 Eliz. c. 4. s. 40. A. D. 1558.

In the emergency which frequently brings even the best of men to a serious but hasty recollection, as to a proper disposition of their effects; it is often that they are not readily furnished with the correct title of the hospital, or institution, to whose charitable designs they would wish to contribute, out of the surplus of their fortunes; it may be feared that an apprehension might then arise, lest, by an error of so simple a kind, the testator's intentions might be defeated; wherefore, to obviate such a difficulty, we find an act which appears evidently made for the benefit of Christ's Hospital, St. Thomas's, and 14 Eliz. c. 14. A. D. 1571. 2 Burn, 291.

St. Bartholomew's, but it includes also all other hospitals; declaring "that all gifts, legacies by will, feoffment, or otherwise, for relief of the poor in any hospital, then remaining and being *in esse*, shall be as valid, according to the true meaning of the donor, as if the said corporation had been therein rightly named; saving to all other persons what right they might have in the lands, &c. given." The same act then recites one preceding, and explains, that the words "master or guardian of any hospital," mentioned therein, were "intended and meant of all hospitals, maisondieus, bead-houses, and other houses, ordained for the sustentation or relief of the poor, and shall be so expounded and taken for ever."

13 Eliz. c. 10.

It has been since decided, that the act of the 13th Eliz. c. 10. to which this refers, extends to all manner of hospitals, whether incorporated by name of master, or warden, or by any other name, or whether a sole corporation, or an aggregate of many; for this act has always had a benign and favourable construction, to prevent all inventions and evasions against its true intent; therefore it may be presumed, that the same construction may be extended to that statute, which refers to and confirms it; though in its strict application it is certainly confined to hospitals incorporated, and in being at that time.

5 Co. 14 b. 11 Co. 76. a Palm. 216.

As the intention of every founder of a college, hall, school, or hospital, is, that all elections, presentations, or nominations to any of the offices therein, should be free from all corruption, or reward; we are led to the 31st Eliz. to an act which declares, that if any person or persons, bodies politic or corporate, having a voice therein, shall directly or indirectly, take or receive any fee or reward, or any other profit, security, or promise of reward for his voice, or assent in any election, that then the office which such person so offending shall hold therein

31 Eliz. c. 6. A. D. 1589. 2 Bulst. 182. 3 Ibid. 88. 90. Moor, 877. Pl. 1231. 2 Haw. Pl. 789. —896.

therein shall become vacant, and the crown, or to whomsoever else the presentation shall belong, shall present a successor, as if he were naturally dead: and if any officer shall take money, or security for money, to resign in favour of another, he shall forfeit double the sum, to be sued for by action of debt, half to the house, and half to the person suing; and notwithstanding the sum paid by such person so contracting, a new election of another shall be had, and he shall be incapable of holding that place for that turn. Hob. 75. 167. 1 Cro. 357. March, 84.

This act points evidently at the colleges; and although their peculiar statutes, and the acts confirming them, are rather out of the plan and design of this work, yet as the words *schools* and *hospitals* are inserted in it, and as the spirit of the act may stand as a direction in all elections at the present day, whether to incorporated or to voluntary institutions, I hope it will not be deemed any presumption to add, that while the act prohibits private persons of a corporation from taking bribes for their votes, or selling their next presentations, it likewise applies the prohibition to bodies politic "or corporate." The strict culpability of the institution receiving a consideration for their aggregate voice is certainly evaded by the modern practice, in some institutions, of making governors previous to the day of election; though it may reasonably be asked, whether, when a candidate or his friend lays down a considerable sum, and produces as many proxies, or as many persons as the money amounts to, who have merely lent their names for the purpose, without understanding how grossly they are defrauding justice and equity, and the candid and free choice of merit; whether by thus conniving at the worst corruption that ever crept in among the people, that of scoffing in the face of charity, and securing an election, not by the merit of the party, but by the length

of his purse, they are not guilty of an offence against public honour, private conscience, and the spirit of the above-mentioned act?

39 Eliz. c. 5. A. D. 1597. 43 Eliz. c. 7. s. 27. 2 Inst. 720. Vin. v. 16. 414.

The next statute was expressly made for erecting hospitals or abiding and work-houses for the poor. It recites a clause in a former act, whereby it was allowed to give or bequeath lands in fee-simple, to the use of the poor, for provision, sustentation, or maintenance of any house of correction, or abiding houses, or of any stocks, or stores, &c. but as this power was ineffectual, because no person could erect such houses without licence under the great seal, "her majesty graciously affecting the "success of such good and charitable works, and that "without often suit unto her, and with as great ease and "little charge as might be, was of her princely care and "blessed disposition, for the relief and comfort of maimed soldiers, mariners, and other poor and impotent "people, pleased and contented that it should be enacted, "That any person seized of any estate in fee-simple, at "their pleasure should have full power within twenty "years then next, by deed inrolled in chancery, to erect, "found, and establish one or more hospitals, maisons-de-dieu, abiding places, or houses of correction, at "their will and pleasure, as well for the finding sustentation and relief of the maimed poor, needy, or impotent, as to set the poor to work, to have continuance "for ever; and from time to time, to place therein such "head and members, and such number of poor, as to "him, and his heirs and assigns, shall seem convenient. "That such hospitals or houses shall be incorporated, "and have perpetual successions for ever, in fact, deed, "and name, and of such head, members, and numbers "of poor as shall be appointed, or named by the "founder, by such deed inrolled: and shall be a body "politic and corporate, and by such name of incorpora-

"tion,

"tion, shall have power to purchase, take, hold, and "receive, enjoy, and have goods or lands being freehold, "so that the same exceed not the yearly value of 200l. "above all charges and reprises to any such house, and "so as the same be not holden of the crown, or other "person in capite or by knight's service, without licence, "writ of *ad quod damnum*, the statute of *mortmain*, or 7 El. 1. st. 2. "any other statute notwithstanding; and may sue and "be sued, have a common seal, be visited and directed "by such persons, and have such statutes, and its "officers be appointed and elected as the founder shall "direct."

"All leases, grants, conveyances, or estates made Sect. 2. thereby, exceeding the number of one-and-twenty years, and that in possession, and whereupon the accustomable yearly rent or more, by the greater part of twenty years next before the making of such lease shall not be reserved and yearly payable, shall be void: saving to all persons (other than the founders) such right, services, and interest in the lands so given as they had before.

"Persons within age, women covert without their Sect. 3. husbands, and not *sanæ memoriæ*, are excluded from making or endowing such corporations. And no such house shall be so erected, founded, or incorporated, Sect. 4. unless it be endowed for ever with lands of the clear yearly value of 10l. provided, that no such incor- Sect. 5. poration shall do any act, whereby its lands, or goods, or any interest, or property therein, shall be vested or transferred in or to any other whatsoever, contrary to the meaning of the act, the construction of which shall be most beneficial and available, for the maintenance of the poor, and for repressing and avoiding all acts and devices to be invented, or put in ure, contrary to its true meaning." Made perpetual by 21 Jac. I. c. i. 13 & 14 Car. 2. c. 9. 7 & 8 W. 3. c. 37. 9 G. 2. c. 36.

39 Eliz. c. 6. There was another act which immediately followed, for awarding commissions to inquire of lands or goods given to hospitals, or other charitable uses misemployed, and to reform them: but this was repealed in about four years afterwards, as shall be noticed hereafter.

The above act produced a very strange dispute among the learned and artful; namely, as the endowment was extended to two hundred pounds annual income, what should be done with the overplus, if the lands or revenues should chance to produce more? But after a variety of very solemn arguments on a point of law so *abstruse*, it was decided that the sum of 200l. was a restraint upon the founder, but did not prevent, or mean that the hospital should not enjoy the increase thereof; when once it became possessed and endowed, all subsequent profits followed of course.

2 Inst. 722. Duke 68-9. 71. 8 Co. 130.

The reason for the legislature promoting such incorporations was obvious; they desired to see public charity, and the protestant interest, well rooted among the people: if land was granted for the purposes of charity, or religion, or learning, to twenty individuals not incorporated, there could be no other legal way of continuing the property to any other persons for the same purposes, than by endless conveyances from one to another, as often as the hands changed: this is the case at present with all our institutions that are not incorporated; their possessions are held by trustees, and when these are reduced to three, their number should be filled up (a power which the commissioners had by 43 Eliz. c. 4.); but if this be neglected, that would not extinguish or determine their right; for if it survive to one trustee, he would have a better right than any one else could pretend to, and might well convey over to other trustees; and indeed this is his duty, to which the court, on his refusal, would compel him.

1 Black. Com. 468.

Duke, 68. 67.

2 Vern. 749.

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The best mode that appears to me, and which I adopted under a very eminent opinion, when the trustees of lands were reduced to three in number, was by lease and release, in which the remaining trustees conveyed to themselves and three new trustees, to the use of themselves and the new trustees and their heirs jointly, to and for the only use, and in trust for the charity;* thus no separate declaration of trust was necessary: by which method the former trustees were not excluded from the trust; for it is a credit to every institution, that the elders of it, who have exerted and contributed liberally to its early promotion, should remain upon its writings as the trustees of its wealth.

But when individuals are consolidated and united into a corporation, they and their successors are then considered as one person in law; as one person they have one will, which is collected from the majority; this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws: the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present year, or that shall ever hereafter exist, are but one person in law, a person that never dies. In like manner, says Mr. Justice Blackstone, as the river Thames is still the same river, though the parts which compose it are changing every instant, such are corporations aggregate: and though these privileges belong as well to *lay* as to

1 Black. Com. 468.

* This practice generally prevails at this day, notwithstanding the act of 15 R. 2. c. 5.

eleemosynary societies, yet it is for our present purpose to apply them only to the latter, which are always under the protection of the crown; (though the king may perhaps have no presidency in the establishment;) for as *parens patriæ* he has the general superintendance of all charities; wherefore it is always considered, that it is he who erects, the subject is only instrumental; and thus his attorney-general is the guardian of their rights, and the relator of their claims, as well as their grievances, before the Court of Chancery. But in addition to every rule that can be laid down for the government of charitable foundations, there is one that applies to them all, whether supported by charter or by statute, by endowment, or by continual contribution; namely, a strict and conscientious adherence to the true end and design of the founders or the contributors; and it should be remembered, that in private as well as public life punctuality and justice are a continual shield of defence.

43 Eliz. c. 2. s. 5. A. D. 1601. By a subsequent statute for relief of the poor, churchwardens are impowered, by leave of the lord of any manor, whereof any waste or common in their parish shall be parcel, and on previous agreement with him in writing, or otherwise, according to any order of the justices at a quarter sessions, by like leave of the said lord, to erect, build, and set up in fit and convenient places of habitation, in such waste or common, at the several charges of the parish, or otherwise of the hundred or county, to be taxed as therein expressed, convenient houses of dwelling for the impotent poor, and to place inmates, or more families than one, in one cottage or house, and the same to be solely appropriated to that purpose, notwithstanding the statute of 31 Eliz. c. 7. (Continued by 3 Car. I. c. 4. and further by 16 Car. I. c. 4.

43 Eliz. c. 4. In the same year, the act to redress the misemployment of lands and effects given to charitable uses was also

also made, vesting a general power in certain commissioners to inquire into all such abuses, and make decree therein.

The act recites, "that lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, had been given, limited, appointed, and assigned, as well by the queen, as by sundry other well-disposed persons; some for relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; some for education and preferment of orphans; some for relief, stock, and maintenance of houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes; which lands and effects had nevertheless not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same; for redress and remedy whereof the act proceeds to appoint the Lord Chancellor, or keeper of the great seal, and chancellor of the dutchy of Lancaster, for the time being, from time to time, to award commissions under the great seal, or seal of the county palatine, as the case shall require, to the bishop of every diocese and his chancellor, and other persons of good and sound behaviour, authorizing them, or any four or more of them, with the assistance of a jury to inquire of all such gifts and abuses, breaches of trusts, negligences, and misemployments, not employing, concealing, defrauding, misconverting, or misgovernment

Cro. Car. 526.

Hob. 136. 43 Eliz. c. 4.

government of any lands, rents, annuities, profits, effects, stocks, &c. given, or thenafter to be given, limited, appointed, or assigned for any of the charitable or godly purposes before rehearsed; and their decree to be reversible only in chancery or the dutchy court."

Sect. 2. The act was declared not to extend to any gifts to the Universities, or to Winchester, Westminster, or Eton
1 Lev. 284. colleges, or any cathedral or collegiate church, or to any
Sect. 3. city or town corporate, or to any lands given within any such city or town, where there is a special governor or governors appointed to govern or direct such lands or things disposed to any of the uses aforesaid, nor to any college, hospital, or free-school, which have special visitors or governors, or overseers appointed by their
Sect. 4. founders; or to prejudice the jurisdiction of the ordinary: and that no person having any interest in the places or
Sect. 5. goods in question, should be a commissioner or juror to inquire thereof.

Sect. 6. That no person having purchased such lands or effects for a valuable consideration, without fraud or covin, having no notice of their being given for a charitable use, shall be impeached of the commissioners by any decree concerning his estate therein; but recompense shall be ordered against such as being put in trust, or having notice of the charitable use, shall break the trust, or defraud the same uses by any gift, conveyance, or conversion, &c. and against his heirs, executors, or adminis-
Sect. 7. strators, as far as they have assets. Lands conveyed, or fallen to the crown by statute, surrender, exchange, relinquishment, escheat, attainder, conveyance, or otherwise, if they had been granted to any of the aforesaid charitable uses at any time since her majesty's reign, were adjudged liable to examination.

Sect. 8. The commissioners to certify their decrees into chancery or the dutchy court, which shall make order for the execution

execution thereof, whereto also all appeals lie thereon, and from thence to the house of lords; and costs to be awarded at discretion against such as complain without just cause. Sect. 9. Cro. Car. 40. Duke, 62. 4 Ann. c. 14.

The preamble of this statute sufficiently shews how the humane disposition of the crown and people had extended and branched itself forth into a very numerous class of public charities, which have since greatly multiplied.

After the passing this act, it became necessary for the courts to define, upon the principles of the reformation, what was and what was not a *charitable use*: and it was settled, that to appropriate lands or money towards the finding or maintaining a stipendiary priest, or for an anniversary or obit, or for any light or lamp in any church or chapel, in order to pray for any soul out of purgatory, or any such intent, were all *superstitious uses*, within 1 Ed. VI. c. 14. and became forfeited to the crown; but if any charitable use was intermingled with the superstitious use, there the crown only took so much as was devoted to the latter *.

Hence it was also held, that all which were not superstitious in such devises became charitable uses, viz. such as were given by deed or will for relieving, maintaining, repairing, educating, preferring, supporting, aiding, redeeming, and easing the aged, impotent, and poor; for maintenance of sick and maimed soldiers and mariners; for erecting and maintaining free schools, or other schools of learning; for maintenance and help of scholars in the university; for relief, stock, or maintenance of houses of correction; for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; for the education and preferment of orphans; for the marriages of poor maids; for the support, aid, and

* Herne on Charitable Uses, 214.

help

help of young tradesmen, handy-craftsmen, and persons decayed; for relief and redemption of prisoners and captives; for aid or ease of any poor inhabitants concerning payment of *fifteens*, setting out of soldiers, and other taxes; for maintaining preachers*, ministers, endowing schools, founding hospitals, for building a session-house, repairing a pulpit and its appendages; setting up bells, &c.

Charity, in its original sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed by the court. There its signification is derived chiefly from the Statute 43 Eliz. c. 4.

Sir W. Grant, Rolls, 2 Ves. jun. 405.

It was held under this statute, that a tenant-in-tail, without levying a fine or suffering a recovery, might appoint to a charity, and it bound him in remainder. But a will wanting witnesses did not operate as an appointment. *Attorney-General* v. *Barnes*.

Finch, Pre. Cha. 16.

Ibid. 270, 289. Roberts, 352. 2 Vern. 597.

As there was an exception out of the statute of wills of devises in mortmain to corporations, it should seem that these dispositions of land are left by that statute in their original state of disability. The 43 Eliz. c. 4. gives efficacy to appointments to charitable uses, and for the benefit of the universities; and it does not seem clear how this enabling act can be construed to act as a repeal, as to charitable uses, of the former statute of 32 Henry VIII.; it only gives a power which never had before existed, and which the statute of Henry had denied†.

Roberts, 353. On St. Frauds.

The

Barnard. 490, A. D. 1741.

* Lectures began to be established in the reign of Queen Elizabeth; and Archbishop Laud was for suppressing them, by reason that they did not come in by presentation, but by the choice of the parishioners.

† By the civil, and more particularly by the canon law, certain preferences and indulgences were allowed to testaments *ad pias causas*; but it

The truth is, that under this last-mentioned act, a devise to a charity was considered as operating not as a will, but as an appointment, and therefore seems wholly independent of the act of Henry VIII. The danger of parol and nuncupative dispositions of land, after the 43 Eliz. which had broke through the barrier in favour of alienations to charitable uses, seems to have induced the judges to hold, that a testament giving land to a charitable corporation was not good, unless in writing according to the exigency of the statute of wills, notwithstanding such devises were excepted out of that statute, and validated by the statute of Elizabeth, not as testamentary dispositions, but as privileged conveyances under the special authority of that law. See *Jenner* v. *Harper*, Prec. Cha. 389. 2 Roberts, 854. 1 P. W. 247.

Between the statute 29 Charles II. c. 3. and that of 9 George II. c. 36. when the statute of 43 Eliz. c. 4. was in force as to wills, it was sometimes a question whether a devise to a charity, or to charitable uses, of real estate, unattested by three witnesses, and therefore void under that statute, could operate as an appointment under the latter statute. Lord *Somers* held, that as the testator intended to dispose of his property by will, and that being void as a will, could not be construed into, and operate as an appointment. But afterwards Lord *Hobart* and the Chief Baron held, that the devise was void in law, because the statute of wills did not allow devises to corporations in mortmain; but that it was within the statute of uses, under the words "limited and appointed." Collison's Case, Hob. 136.

it does not appear that our law makes any distinction in favour of a will for the benefit of a charity; and on a deficiency of assets, legacies to a charity will abate in proportion with others. But, nevertheless, our courts of law or equity will not enjoin the spiritual court from proceeding in legatory matters according to the civil law. Cro. Car. 57. 2 P. W. 368. 1 P. W. 674. 422. 1 Vern. 230.

And

And in the case of *Adlington* v. *Cann*, mentioned in its proper place, it has since been settled, that all charitable uses fall entirely within the restrictions and requisitions of the statute of frauds.

By a due attention to the language of the sixth section of this statute, it will appear that care was taken to protect all purchasers of land, charged with a charitable use, if they had not due notice of it, from the proceedings of the commissioners for any breach of the charity trust; but, on the contrary, that their measures should be directed rather against the vendors, who had thereby abused it:—but a purchaser who had bought for an inadequate consideration, would not be protected by this clause; and its inadequacy would be measured according to the rule of the civil law.

If a rent-charge were granted out of land to a charitable use, and the land be afterwards sold for a valuable consideration to one who had not notice of it, it has been said that the rent remains; because the purchase was of another thing, which was not given to the charitable use. But in *Tothil*, 258, the same case is referred to as an authority, that a purchaser coming in without notice of a rent-charge, shall not be chargeable therewith, although given to a charitable use—and this seems the better opinion.

Greensted Case, Duke 64.

If the first purchaser give a valuable consideration, and yet have notice, all that claim in priority under the estate and title, whether they have notice or not, will be bound by the decrees of the commissioners under the 43 Eliz. c. 4. This rule differs from the general rule of equity in this respect—a subsequent purchaser, without notice, not being affected by notice in the person of whom he purchased—with this exception, however, the same rules seem to prevail in the construction of the statute with respect to notice as are generally adopted

adopted by equity. It was therefore settled, that notice to a purchaser must be in the same transaction. In a case where land given to charitable uses was intended to be sold by act of parliament, and when the bill was read, it was declared that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill did not pass—and afterwards the land was sold to one of the members who spoke in the debate. Yet this notice was held not to be sufficient, because it was not made known to the purchaser at the time of his purchase, except as a member of parliament. Thus, constructive notice is in its nature no more than evidence of notice; the presumptions of which are so violent, that the court will not allow even of its being controverted: but it is difficult to say what will amount to constructive notice.—See Roberts on Statute of Frauds, who offers some useful rules on this subject. Duke, 180.

A liberty within a parish, and contributing towards the repairs of the parish-church, but having distinct overseers, and maintaining its own poor distinctly, is not entitled to a share of the charities given or bequeathed to the parish generally; though it is entitled to its proportion of the collections at the church-door, and at the sacraments. Before the statute of 43 Eliz. c. 4. there were no such officers as overseers of the poor, and therefore the liberty was held to be entitled to its share of all such charities as were given before that part of the parish was separated by such distinct officers. And as they contributed to repairs and towards the parson and lecturer (there being at that time, in vacation, no preaching at the Rolls chapel), and to the charities of St. Dunstan's parish, it was held that the poor ought to have a proportionable share of those charities; and a book was ordered for entries thereof. It was held also, that a parson is not bound to distribute money given at sacraments Attorney-General v. Grant, 1 P. W. 670.

sacraments among the parishioners; but the court said, surely if equal objects of charity are to be found within the parish, they in reason ought to be preferred.

1 Burn Eccl. Law, 265. Duke, Cha. Us. 82.

Money was given to maintain a preaching minister: this was not a charitable use named in the statute; yet by the Lord Keeper and two judges it was decreed to be good, and a charitable use within the equity of the statute. By parity of reasoning, all charitable donations now made to many of the charities subsisting, which had no existence at the time of the act (A. D. 1601), are good under the same statute, and therefore liable to the same examination. But it was held, also, that a school, unless it be a free-school, was not a charity within the provision of this act, and consequently the inhabitants had not a right to sue in the name of the Attorney-General—but the practice is now different. It was held, also, that this act supplied all defects of assurances, by any misnamings (in addition to the 14th Elizabeth, c. 14. already mentioned), provided the donor had a good disposing power in him—and thus the favourable construction to all charity acts, which was a maxim universally held and adopted in those days, induced them to establish a devise of lands to a charitable use, notwithstanding the many previous restraints of *mortmain*, under the construction of the words *limited and appointed*, used in this act; and it was allowed that the devise was void in law, but it was good as an *appointment*, under the statute, even without a surrender, if it was copyhold; but a parol devise being defective as a will, could not be admitted as an appointment. So where lands were devised to a college to maintain scholars, it was declared that the corporation were trustees for the scholars, who made a part of the corporation themselves,* and was an appointment within the statute. Thus pious

Duke, 65.

43 Eliz. c. 4.

2 Vern. 387.

Vin. Tit. Cha. Uses.

Duke, 84, 85, 77, 115. Moor. 888, 890. Duke, 67.

Hob. 136. 1 Lev. 284. Prec. Ch. 391.

1 Black. Rep. 90.

* This is the fact in Dulwich College.

and

and worthy men, seeing how much the court of chancery favoured this and the former act, and the construction of trusts which was every day put upon it, instead of devising their lands immediately, devised them to trustees, with appointments to pay the rents and profits to certain charitable uses. Duke, 49.

Seisin was given of lands in the grantor's life-time, and a rent-seck thereout to take effect at his death: this was held good, though the rent did not then take effect, or was then *in esse* at the time of the seisin given. But there was much equity in the following decision: If land be given or vested in trustees for a charitable use, and be by them misemployed, a purchaser, who had notice of the gift, should not be chargeable, further than during his own time, for the arrears; but where the rent had been concealed, he would be liable for the whole arrears; for the land was a debtor, and *transit cum onere*. But this is a case which, in the regularity and caution of most modern conveyances, can now scarcely ever happen.

But the following case will further shew how much the courts have favoured the design of this statute:

A feme covert made a will, bequeathing part of a debt due to a former husband, to whom she was administratrix, to her relations, and the residue of it to a charity, and died in the lifetime of her second husband: her executors refused to meddle with the debt, because she had it but as administratrix, and could not make a will, and because it was a chose in action; whereupon administration of the goods unadministered of her first husband was committed to Damus and others; and they had thereby debts of 2000l. besides the debt so bequeathed by her. On an inquisition and decree under this act, the court decided, that though the will was void in law, yet it was good; it would serve for a declar- Moor, 822.

ation upon the statute; so that if there were assets of that estate, or of *his* own estate, that was to *execute* it, the use should be supported; for the goods in the hands of administrators were all to go and be employed to charitable uses, and kindred and children could have no property nor pre-eminence in them, but under the charity of the ordinary. It was confessed, that when the decree was made by the commissioners the estate would have borne it, and there were assets; and therefore there was negligence in the management of the estate: whereupon Damus was compelled to pay the charity legacy, and to take the help of the court for recovery of the debts of the intestate.

Owen 33, 34. So when executors, having effects of their testator to dispose of to pious uses, they could not forfeit them, for they were not in their own use; but their own power is subject to the control of the ordinary, and the ordinary might make distribution of them to pious uses. And it was said at the bar, that the ordinary might make the executors account before him, and punish them according to the law of the church, if they spoil the goods; but cannot compel *them* to employ the same to pious uses.

Duke, 184. Again: A testator having goods left in his hands to a charitable use, made a feme covert his executrix: her husband having no notice of the use, gave the goods that so came to his wife by will, or otherwise converted them to his own use; the wife only was chargeable, and not the executors of the husband, unless they had had notice of the use: and if such goods were wrongfully taken away, and sold in a public market, the trespasser was to be charged with a recompense, and the recoveter would remain liable to the charity.

So an administrator, *durante minori ætate*, without notice of a charitable use, employed assets to the benefit of

of the infant, the effects of the infant were liable to the charity; but if he wasted the assets, he would himself be liable.

Assets, in equity, were held to satisfy charitable uses, before debts or legacies; because assets in equity were disposable by this statute, which ordains them to make recompense; and the equity of this statute was held to be above the equity of the chancery. But assets in law were held to satisfy debts before charity, because the common law must order their disposition; yet charities were then to be preferred before other legacies, in disposition of assets in law. The case is much otherwise at this day, as will be shewn hereafter. Duke, 186.

These cases are mentioned to shew the spirit of those times, and the construction which even the best lawyers were willing to extend to an act favourable to charity. These, among a variety of others, which have necessarily been examined, may sufficiently prove how very different the law is at this day, since the last *mortmain* act was passed.

A legacy to a parish church is good, and belongs to the churchwardens for the repairs of the church, and not to the vicar. Money or charity given for repairing a church is one of the charities mentioned, preferred, and established by 43 Eliz. c. 4. as on the one hand the parson of the church is a corporation for the taking of land for the use of the church, and not capable of taking goods or any personalty on that behalf; so on the contrary, the churchwardens are a corporation to take money or goods, or other personal things, for the use of the church, but are not enabled to take lands. Goods given or bought for the use of the church are all *bona ecclesiæ*, for the taking whereof the churchwardens may bring trespass, as well if the trespass were committed F. N. B. 91 E.

2 P. W. 125. 1722. in the time of their predecessors, as in their own time, *Attorney* v. *Ruper.*

I have purposely avoided entering further into the cases, with the decrees made by the commissioners acting under the authorities of this act, as many of them, however curious, are not so useful at this time, as the attention which will be found necessary to those which have arisen since the statute of 9 George II. c. 36.

As the 39th Eliz. c. 5. was meant to continue in force only twenty years, that short term expired in the midst of the zeal of many charitably disposed persons, who, however, having caught the example, extended their exertions beyond that period; and in order that their pious endeavours for the welfare of their fellow-creatures might not be frustrated, the legislature passed an act to render the powers of that statute perpetual, and to give the same privileges to all hospitals erected since the expiration of that term of twenty years, as they could have had under the former statute.

21 Ja. 1. c. 1. A. D. 1623.

Apprentices.

The legislature has likewise had regard to the welfare and proper disposition of youth, in the labour of husbandry, or in trades and manual occupations; although these endeavours have not always, for want of enforcing stricter regulations, been attended with success. Queen Elizabeth, in her last statute for relief of the poor, empowered church-wardens and overseers, by the assent of two justices of the peace, to bind out poor children taking benefit of their parish, to be apprentices where they shall see convenient, till the man child should arrive at the age of 24 years, and the woman child to 21, or time of her marriage; and the same should be as effectual as if such child were of full age, and by indenture of covenant bound him or herself. And considerable donations having been made to corporations to be continually

43 Eliz. c. 2. s. 5. A. D. 1601.

continually employed in binding out, as apprentices, a great number of the poorest sort of children, from which great benefit had accrued, as well to such corporations as to the commonwealth in general, in the saving young people from idleness and disorderly lives; and as it was very likely, that many other well-disposed people would be the better encouraged, willingly to follow the like good example, in bestowing also large sums of money to the same good and godly purposes, if it might be so provided, that such monies as had been already so freely given, or as then after should be given, for the binding out of such poor children apprentices, might continually remain, and be wholly employed accordingly: It was enacted, in the following reign, that all such donations should continue and remain in the hands of any corporation, or in places not incorporate, in the hands of the *parson* or vicar, constable, church-warden, collector or overseer, to such charitable uses, for the binding forth so many apprentices as the donors should appoint by will or otherwise. The master or mistress so receiving any such fee, to be bound with good sureties to repay the same, at the expiration of the seven years for which the apprentice is bound, or if he die within that time, then within one year of his death; and if such master or mistress die within the apprenticeship, then the same to be repaid within one year, that so the same money may be again employed for the purpose of placing such apprentice with some other person, for the residue of his term, at the discretion of the trustees. 7 Jac. 1. c. 3. s. 2. A. D. 1609. Sec. 3.

The money to be so appropriated within three months after it shall come to their hands; and if there should not then be fit and apt persons to be so bound, then such of the poorest children of any of the parishes next adjoining to be bound forth at the discretion of the trustees; choice being from time to time to be made of the *poorest* Sec. 4. Sec. 5.

sorts of children, and whose parents are least able to relieve them; nor any to be above 15 years of age when first bound. Accounts to be kept of the sums received and employed, and remedies for any breach of the trust to be referred by petition to the court of Chancery. All persons to whom such apprentices shall be bound may take and receive and keep them as apprentices, any former statute notwithstanding. And all fees given with any such apprentice, placed out at the common or public charge of any parish or township, or by any public charity, are exempted from the stamp-duty raised upon apprentice-fees in general.

21 Ja. 1. c. 8. 5 El. c. 4. 39 Eliz. c. 12. 1 Ja. 1. c. 25. s. 17. 8 Ann, c. 9. s. 40.

Finch, Cha. Ca. 187.

A bequest for this purpose, to put out poor children of a parish, must, under the construction of the above act of 7 Ja. I. c. 3. be paid to the parson of the parish.

2 Ves. 245.

This charity for binding out poor apprentices appears to have been founded under the immediate care of the legislature:—and it may not be much out of place to notice, that the whole spirit of this act of 43 Eliz. c. 2, implies, and the operation of the 3d and 4th sections in particular, intimates, that their guardians, the trustees, are by no means discharged of their duty by the act of binding, but a parental obligation still rests upon them to see the children well taken care of according to the tenor of their binding:—for the misconduct, or the ill success, or the death, of their master, may render it essentially necessary for their protection, that they should have the power of recurring to their trustees either to procure them redress, or another master: the evil consequences of so painful an interval are too obvious to be enumerated, and may probably cast the lot of their future lives!

The establishment of several charitable institutions, as well by charter as by statute of incorporation, has been

been generally accompanied with some, if not an entire, exemption from the restraints of *mortmain*. In several this exemption has been limited to a specific purpose, or to a certain quantity of land or of value. It may be proper to notice some of these establishments before we proceed to the last statute.

Sutton's hospital. See P. III. c. ii. on Leases. 9 Ja. 1.

The college of *God's Gift*, at *Dulwich*, in *Surry*, was founded by Edward Alleyne, Esq. in 1619, upon the letters-patent of incorporation, dated 21st June, 17th James I. to consist of a master, a warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, to purchase and take from him the manor or lordship of Dulwich, with its rights and royalties in Surry and Kent, and some houses in the parish of Bishopsgate and Cripplegate, London, notwithstanding the statute of *mortmain*. And the Archbishop of Canterbury, for the time being, was thereby appointed visitor. This college has been lately much favoured by the legislature, in two statutes for inclosing their lands, and for enabling it to grant long leases, &c. See postea, Part III. chap. ii. on Leases. 17 Ja. 1.

The act for the relief of the poor, made in the reign of Charles II. directs, that there shall be one or more corporations or workhouses within London and Westminster, and within the boroughs, towns, and places of Middlesex and Surry, situate in the parishes mentioned in the bills of mortality: the act establishes them into corporations, and gives directions for their government, &c.—Made perpetual by 12 Ann, st. 1. c. 18. sec 1.—and see 17 George II. c. 5. 13 & 14 Car. 2. c. 12. s. 4. 1662.

The act for the incorporation of commissioners of the Bedford Level, consisting of 95,000 acres, authorises them, without license of *mortmain*, to purchase lands not exceeding 200l. *per annum*, and goods and chat- 15 Car. 2. c. 17. s. 2. 1663.

tels, and to dispose thereof in the name and to the use of the corporation.

17 Car. 2. c. 3. s. 7. The act for uniting churches in cities and towns corporate, empowers the owners of impropriations or tithes to bestow the same thereon; and benefices under £.100 *per annum* to be augmented by purchase of lands, without license of *mortmain*.

The Scots hospital, in Crane Court, for the relief of the aged and necessitous poor of Scotland within London and Westminster, was incorporated by royal charter, A. D. 1665, confirmed by letters-patent in the year following by the name of "The Scots Hospital of King Charles II." has license to purchase in *mortmain* lands to the value of £. 400 *per annum*.

The act for advancing the sale of fee-farm and other rents in the reign of Charles II. allows all bodies corporate, &c. to purchase them without such licenses.

22 Car. 2. c. 6.

And about the same time, the commissioners acting under the act of 43 Eliz. had an additional office assigned to them by the legislature; which proves, that the intention was to extend their power to all charitable institutions, whether they were established into corporations or not; for in the act made for the relief and release of poor distressed prisoners for debt, these commissioners are directed to use their best endeavours and diligence to examine and find out the several legacies, gifts, and bequests, bestowed and given for the benefit of poor prisoners for debt, in the several gaols of this kingdom; and to settle and order the same in such manner, that the prisoners might not be thenafter defrauded, but receive the full benefit thereof, according to the intent of the donors.

22 & 23 Car. 2. c. 20. s. 11. 1670.
2 Geo. 2. c 29. s. 7.
Strengthened by a rule of court, &c. 11 G. 2. c 20. 32 G. 2. c 28. s. 9. 10.
And for setting them to work, 12 G. 2. c. 29. s. 23.

The same respect was afterwards paid to the above statute of Elizabeth, which was deemed the bulwark of charities, in the act for the augmentation of small vicarages

ages and curacies; which authorises a perpetual and proportionable reservation out of the issues of any rectory impropriate or portion of tithes, which are to be held chargeable therewith, and subject to distress or disability of the party on non-payment, notwithstanding the statutes of *mortmain*; and it was declared, that if any question should arise concerning the validity of such grant, such favourable constructions, and such further remedy, if need be, should be had as in former cases of charitable uses. 29 Car. 2. c. 8. 1676. Sect. 7.

Greenwich Hospital, which stands upon the site of a royal palace, was incorporated by William III. 10th September, 1695, and an annual sum granted thereto out of the treasury. Every seaman pays sixpence a month towards it: the king was empowered to grant part of his manor at Greenwich to its use. The crown, by a variety of acts, has been since empowered to dispose of large sums for its benefit; unclaimed prize-money has been bestowed upon it; the rents of the Derwentwater estates, forfeited for high treason, were applied to it: and the governors were empowered to purchase lands for the completion of it. Its opulence, and grateful care of those brave men whose vigor has been spent in the service of their country, is a monument of praise to our legislature and our nation. See P. III. ch. ii. of Leases. 7 & 8 Wm. 3. c. 21. s. 10. 8 & 9 Wm. 3. c. 22. 12 & 13 Wm. 3. c. 13. 4 Ann, c. 12. s. 14. 6 Ann, c. 13. s. 11, &c. 10 Ann, c. 17. 8 Geo. 2. c. 29. 11 Geo. 2. c. 30. 22 Geo. 2. c. 32. 25 Geo. 2. c. 42. and a variety of other statutes.

The different parishes of Bristol were incorporated by act of parliament in 1695-6, and the management of all parochial concerns within the city vested in a corporation. This act was adapted only to cities and great towns, and could not be a model for the counties at large. 7 & 8 Wm. 3. c. 32.

Many of the kings of England have claimed a power of dispensing with statutes; which power was carried to such a height in the reign of James II. and found to be 2 Burn. Eccl. Law, 474.

be of such dangerous consequence, as to make the execution of the most necessary laws in effect precarious, and merely dependent on the pleasure of the prince; and it seeming highly incongruous that the king should have a kind of absolute unlimited power of dispensing with laws, wherein the church and state have the highest interest, when at the same time he has no power to dispense with any law which vests the least right or interest in a private subject, it was found by experience necessary to enact, that no dispensation by *non obstante* to any statute shall be allowed; but that the same shall be void and of none effect, except a dispensation be allowed in such statute.*

1 W. 3. sess. 2. c. 2.

2 How. 391.

But for the promotion of religion and learning, it was afterwards felt most expedient to renew the encouragement to found seminaries, which the late disputes and the restraints of *mortmain* continued to repress; wherefore in the next statute on this subject we find it recited, "that it would be a great hindrance to learning and "other good and charitable works, if persons well inclined might not be permitted to found colleges or "schools for encouragement of learning, or to augment "the revenues of those already founded, by granting "lands thereto, or by granting lands to other bodies "politic or incorporated, then in being, or thenafter to "be incorporated, for other and public uses: it is enacted, that it shall be lawful for the crown, as often "as it shall think fit, to grant to any persons, bodies "politic or corporate, licence to alien in *mortmain*, and

7 & 8 W. 3. c. 37.

* Charles I. resolved to set about a recovery of the tithes and church-lands which had been alienated in former reigns; several of them were purchased at low rates, and then with a shew of zeal surrendered to the crown. He purchased some estates of small value, and added them to several bishopricks; and all those who sought for favour at court offered their churchlands to sale at a low price. 1 Burnet, O. T.

"also

"also to purchase and hold in *mortmain*, in perpetuity, "or otherwise, any lands of whomsoever the same shall "be holden, which shall not be subject to forfeiture by "reason of such alienation or acquisition." This right remains appended to the royal prerogative, and is recognised and established in these cases*.

Notwithstanding the many attempts to settle a proper support for the clergy since the reformation, government had never been able to attain this point; by reason whereof, divers mean and stipendiary preachers were in many places entertained to serve the cures, and officiate therein; who depending for their necessary maintenance upon the good will and liking of their hearers, had been under temptation of too much complying and suiting their doctrines and teaching to the humours, rather than the good, of their hearers, which had been a great occasion of faction and schism, and contempt of the ministry: wherefore queen Anne, desirous of rendering the clergy more independent, had remitted the first-fruits and tenths of poor clergy; and by this act relinquished her whole revenue arising from that source, for the purpose of erecting a corporation, to appropriate the same for a perpetual augmentation of the maintenance of poor clergy, in places where the same are not sufficiently provided for: the act empowers the queen to institute such a corporation, and authorizes all persons charitably disposed towards so good a work, to grant or devise their lands or goods, for the purpose of carrying its designs into execution, notwithstanding the restraints of *mortmain*.

26 H. 8. c. 3. c. 17. 27 H. 8. c. 6. 32 H. 8. c. 22. c. 47. 2 & 3 Edw. 6. c. 20. 7 Edw. 6. c. 4. 1 Eliz. c. 4.

2 & 3 Ann. c. 11. A. D. 1702.

Sec. 4.

In consequence of this act, the queen, by letters-patent,

* This subject will be more fully noticed in treating of purchasing lands, in Part II. c. i. s. 2.

erected

erected the corporation, known by the title of "Queen Anne's bounty;" but the terms of the act being generally expressed, and without any exceptions as to the poorer clergy having small livings, they were still liable to the payment of this duty, which their incomes could but ill support; and several of them were, in consequence, held by sequestration by temporary curates, without being regularly filled by institution and induction; wherefore a new act was made three years afterwards, exempting all livings of less value than 50l. per annum from the payment of this contribution; but this exemption was not to extend to the tenths of any benefice granted away by the queen's predecessors to any person or corporation. And by the next act, the same bounty was carried into Ireland.

5 Ann. c. 24. A. D. 1706.

Cap. 25.

6 Ann. c. 27. A subsequent statute passed in the following year recites, that the clause of exemption mentioned in the above act was intended only to save the rights of such persons who had grants of the first-fruits of any such benefice from the crown previous to that act; but forasmuch as the said first-fruits, the tenths whereof were so granted, were, notwithstanding such grants, reserved to the crown, and were then granted by her majesty to the governors of Queen Anne's bounty, for the augmentation of the maintenance of the poor clergy and their successors; and forasmuch as the discharging of the first-fruits and arrears thereof of small livings, the tenths of which were not vested in the said governors, would be a proper augmentation of the same: it is enacted, that all ecclesiastical benefices, with cure of souls, not exceeding the improved value of 50l. the tenths whereof are not vested in the corporation, and the incumbents thereof should be for ever discharged from the first-fruits; and the time for payment of such first-fruits,

as remained liable, of considerable benefices, was extended by instalments to be within the space of four years.

This bounty was designed to extend not only to parsons and vicars who come in by presentation or collation, institution and induction; but likewise to such ministers as come in by donation, or are only stipendiary preachers or curates, officiating in any church or chapel where the liturgy of the church of England is used, most of which were not corporations, nor had a legal succession, and were therefore incapable of taking a grant or conveyance of such perpetual augmentation, agreeably to the queen's intentions; and in many places it would be in the power of the impropriator, donor, parson or vicar, to withdraw the allowance paid to the minister or curate serving the cure; or in case of a chapelry, the incumbent of the mother church might refuse to employ a curate, or permit a minister duly nominated or licensed, to officiate in such augmented chapel, and might officiate there himself, and take the benefit of the augmentation, though his living be above the value of those intended to be first augmented, and the maintenance of the curate or minister would thus sink instead of being augmented: wherefore, in a subsequent statute reciting these circumstances, probably from facts which had already happened, it was declared, that all churches, curacies, or chapels, which should at any time receive the intended augmentation, should then become perpetual cures and benefices, and the ministers thereof be deemed in law bodies politic and corporate, and have perpetual succession, and legal capacity to take in perpetuity, all lands, tithes, &c. which should be granted to, or purchased for them, by the governors or benefactors of Queen Anne's bounty, or other persons contributing with them; and the

1 Geo. 1. c. 10. s. 4. A. D. 1714.

the impropriators or patrons be excluded from receiving any profits thereof, directly or indirectly. That the

Sect. 12. incumbent, patron, or ordinary of any augmented living, might, with the concurrence of the governors of this charity, exchange all or any part of the estate settled for the augmentation thereof, for any other estate, in lands or tithes of equal or greater value, to be conveyed to the same uses: and that all lands granted for such augment-

Sec. 21. ations by the governors to any church or chapel, by deed inrolled in chancery within six months afterwards, should go in perpetual succession thereto.

It was, however, found, that the laws for the collec-

3 G. 1. c. 10. A. D. 1716. tion of the perpetual yearly tenths were in some cases defective, and in many instances improper and inconvenient to be put in execution; by reason whereof, the late queen's intentions could not be so easily answered, unless some new regulations were made for the more easy levying and paying the same; for remedy whereof, and that the governors might be better enabled to execute the trust in them reposed, and the poor clergy with greater ease and advantage receive the benefit of this bounty, a new collector was appointed, instead of the archbishops and bishops, who had before received the contributions, and he was directed to pay the same into the exchequer; and thus it continues at this day.

The augmentations made by this corporation are by way of purchase, not by pension; and the stated sum to be allowed to each cure to be augmented is 200l. to be invested by the corporation in a purchase. In order to encourage benefactions, the governors are authorised to give 200l. to cures not exceeding 45l. *per annum*, where any person will give the same or a greater sum, or the value thereof in lands, tithes, or rent-charges.

All

All charitable gifts in *real* or *personal* estate made to the corporation are to be strictly applied according to the direction of the donor; and where the gift is generally to the corporation, without any particular direction, it is applied with the rest of the stock of the society. And the parson whose cure is augmented by this bounty is to receive the augmentation free from all fees of office. And the governors may now contract for the redemption of their land-tax. 42 G. 3. c. 116. s. 15.

In order to promote the residence of the clergy where there is no suitable parsonage-house, the governors are authorised to apply money in their hands towards building, rebuilding, or purchasing such a house within the parish; and the provisions of the statute of 2 and 3 Anne, c. 11. s. 4. are now by this act extended to enable *minors*, insane and feme coverts, to grant lands to the society, notwithstanding the act of mortmain, 9 G. II. c. 36. 43 G. 3. c. 107.

The first notice of Chelsea college, by parliament, was in 1609, when a private act passed for empowering certain persons to bring fresh streams of water, by engine, from Hackney Marsh to London, for the benefit of Chelsea college. That a college for polemical divinity to vindicate the reformation, with power to take lands not exceeding 3000l. should be erected there, and a trench dug for carrying water from the river Lee to London, to maintain it. This college was afterwards relinquished. Parliament gave authority to the crown to incorporate the commissioners of these water-works, by letters-patent; and to enable them to purchase lands of 1000l. *per annum*, and to make bye-laws for their regulation. The present college for disabled soldiers was founded by Car. II. and superseded the original design; and besides contributions, the charges of this national establishment 7 Ja. 1. c. 8. 8 G. 1. c. 26. 1721.

establishment are defrayed by a considerable sum paid yearly out of the poundage of the army, and one day's pay of each officer and soldier.

11 G. 1. c. 12. 1724. The act of incorporation of Guy's Hospital establishes and recites the will of Thomas Guy, Esq. who had, during his life-time, erected, at his own expence, two squares of the hospital, called by his name, in the parish of *St. Thomas*, in Southwark, and thereby devised the residue of his estates, said to be of about the value of 200,000l. to trustees to erect and compleat the plan which he had formed for an hospital for the reception of 400 poor persons, or upwards, labouring under any distempers, infirmities, or disorders, thought capable of relief by physic or surgery, but who, by reason of the small hopes there might be of their cure, or the length of time which might be required for that purpose might be adjudged or called incurable, and as such, not proper objects to be received into, or continued in the hospital of *St. Thomas*, or other hospitals, in which no provision had been made for distempers deemed incurable, of whom he directs them to receive twenty lunatics deemed incurable; and if there should be room, then to receive any number of patients from St. Thomas's Hospital; and he ordered the trustees to apply for letters-patent, or an act of incorporation, to enable them to hold, take, alien, and dispose of his residuary estates, and therewith to purchase, take, and enjoy messuages and lands, and other estates of inheritance in perpetuity, or otherwise, to the value of the said residuary part of his estates, or such further or other yearly value as his majesty or the legislature might deem convenient; that his residuary estate should then be conveyed to the said trustees for the charitable uses which he had appointed; and that they should invest any surplus in the purchase of real estates, as a perpetual provision for the maintenance

maintenance and cure of the poor sick persons to be received into the said hospital; and if there should be more money than should be requisite for those purposes, to apply the surplus to the relief of such other poor sick persons, or such other objects of compassion, as should appear to the governors so incorporated to be most worthy and deserving of pity and relief, or for such other public and charitable purposes as they should think convenient. The governors were, by this act, enabled to hold his estates for the use of the hospital, and to sell and invest the produce in other lands, with all the usual powers of a corporation.

It would extend this work far beyond the limits of its utility to notice every institution which has been privileged by incorporation, with licence to purchase, hold, and alienate lands in mortmain; more especially as that single fact has very seldom furnished a ground for application to either of the Courts of Judicature, or led to any parliamentary discussion of their rights; it has therefore been deemed preferable to close this part of our investigation.

OF

MORTMAIN

AND

CHARITABLE USES.

PART II.

CHAP. I.

OF THE STATUTE OF 9 GEO. II. c. 36.

THE present act of mortmain originated in the House of Commons; and when it was first proposed, it was considerably more comprehensive than when it passed into a law; for the exempting clauses in favour of the universities and colleges therein-mentioned were the result of several petitions against it: as they subsisted by charitable donations, they were reasonably alarmed at the consequences, which they apprehended would prove fatal to their future progress, and several amendments were made in it before it received the royal assent.

The bill was first proposed, and leave given to bring it in on the 5th March, 1735, O. S. and Messrs. *Ord*, *Glanville*, and *Plumer*, with the assistance of Sir Joseph Jekyl, master of the rolls, were ordered to prepare the same. On the 18th it was read a second time, and ordered to be committed to a committee of the whole house, 10 Smollet, 337.

On the 26th of March, 1736, O. S. a petition against it was presented from the university of *Oxford*, stating, that the petitioners were by their constitution entirely founded in charity, and must ever continue to depend upon it; and that notwithstanding the large benefactions with which they had been formerly endowed, yet many of the societies were so meanly provided for, that the pious designs of their founders must remain imperfect without future benefactions, which had been found by long experience to arise by low degrees; that they hoped, when their case should be duly considered, they would not be thought to be within any of the general mischiefs that might arise from alienations in mortmain; that as their present possessions were inconsiderable, in respect of the great number of persons who were maintained out of them, and as the donations they then enjoyed, as well as those they might thereafter receive, must be solely appropriated to the advancement of religion and learning, they hoped that no difficulties or discouragements would be put in the way of those whose pious and charitable intentions might dispose them to give their assistance towards rendering the university in general, as well as the several societies of it, more instrumental in promoting those great and necessary ends, and therefore praying to be exempted from the restraints mentioned in the bill. This petition was immediately referred to a committee of the whole house.

On the 2d of April a petition was also presented by the governors of *Queen Anne's bounty*, praying that their rights might also be saved. And on a motion of reference to a committee of the whole house, that was negatived, there being 95 ayes and 143 noes. It was therefore ordered to lie on the table.

Journ. Dom. Com. On the 5th of April an address was voted for a return of what licences had been granted by the crown, and for what

what values, to aliene in mortmain, and to purchase and *hold* in mortmain in perpetuity, since the act of 7 W. III. c. 37, for the encouragement of charitable gifts.*

On the 8th of April a petition was presented against the bill by the trustees of the several *charity-schools of London, Westminster, Southwark,* and bills of mortality, and other places, stating that the bill would prevent many charitable donations for the promotion of the schools, which were so far from having large endowments in land or money, that very few had so much as a school-house; and that as the voluntary contributions did not equally and regularly answer the constant expences, the trustees in several places had been obliged to reduce the number of children, and in others the schools had been entirely laid down, for want of means to support them; and therefore, after stating their extent and utility, prayed that they might be excepted out of the bill.

On the 15th of April the bill was read a third time, and passed upon a division—ayes, 176; noes, 72; and Mr. *Gybbon,* the chairman of the committee, was ordered to carry it to the Lords.

On the 16th of April the bill was carried to the Lords, read a first time, and ordered to be printed. Journ. Dom. Proc.

On the 20th of April the governors of *Queen Anne's bounty* renewed their petition, which was ordered to lie on the table. The bill was committed to the whole house for that day fortnight, and the Lords ordered to be summoned.

The governors of the charity for relief of poor widows and children of clergymen also presented a petition against it, praying, that as they were advised the bill would not only affect the future interest of their corpo-

* This return does not appear upon the Journals of the Commons, but was made to the Lords on the 19th of April.

ration, but also some of the estates which were then vested in them by law, they might be heard by counsel against it. A similar petition of the incorporated society for the propagation of the gospel in foreign parts was also presented, stating their apprehensions that the powers conveyed to them by their charter might be taken away, or rendered doubtful. These were ordered to lie on the table.

On the 5th of May the master, &c. of *Trinity College, Cambridge*, likewise presented a petition, stating, that they were endowed with the patronage and advowson of many small livings, and apprehended they should be restrained from receiving benefactions; and praying that they might be enabled to sell such of their small livings as they might think proper, which, instead of being of advantage to the college, was a great burden to them. Ordered to lie on the table.

On the 6th of May Lord *Delawar* reported from the committee, that they had gone through the bill, and made one amendment thereto.

On the 11th of May this amendment, namely, (the addition of the 2d section) was proposed by the committee of the whole house, and agreed to. And it was also proposed to omit the words at the close of the first enacting clause—"and unless the same be made to take effect, &c. &c."—which being objected to, it was resolved that they should stand part of the bill.

On the 13th of May the bill passed by a majority: dissentient—*Abingdon*, *Montjoy*, *Northampton*, *Oxford* and *Mortimer*, *Stafford*, *Beaufort*, and *Lichfield*.

On the 14th of May it was returned to the Commons, who agreed to the amendment.

On the 20th of May, this, with other bills, received the royal assent. We now proceed to the statute itself.

The preamble recites, that gifts and lands in mortmain are

are prohibited or restrained by *Magna Charta*, and divers other wholesome laws as prejudicial to and against the common utility; nevertheless, this public mischief had of late greatly increased by many large and improvident alienations, or dispositions, made by languishing and dying persons, or by other persons to uses, called charitable uses, to take place after their deaths, to the disherison of their lawful heirs. For remedy whereof— 9 H. 3. c. 36.

9 G. 2. c. 36. sect. 1. No manors, lands, &c. nor money to be laid out in lands to be given for charitable uses unless by deed inrolled, &c.

It is enacted, "That after the 24th of June, "1736, no manors, lands, tenements, rents, "advowsons, or other hereditaments, corporeal "or incorporeal whatsoever, nor any sum of "sums of money, goods, chattels, stocks in the "public funds, securities for money, or any other "personal estate whatsoever, to be laid out or "disposed of in the purchase of any lands, tene- "ments, or hereditaments, shall be given, grant- "ed, aliened, limited, released, transferred, as- "signed or appointed, or any ways conveyed or "settled, to or upon any person or persons, bodies "politic or corporate, or otherwise, for any estate "or interest whatsoever, or any ways charged or "incumbered by any person or persons whatso- "ever, in trust or for the benefit of any charita- "ble uses whatsoever; unless such gift, convey- "ance, appointment, or settlement of any such "lands, tenements, or hereditaments, sum or sums "of money, or personal estate (other than stocks "in the public funds) be and be made by deed "indented, sealed, and delivered in the presence "of two or more credible witnesses, twelve calen- "dar months at least before the death of such "donor or grantor (including the days of the "execution and death), and be inrolled in his

" majesty's high court of Chancery, within six " calendar months next after the execution there- " of; and unless such stocks be transferred in " the public books usually kept for the transfer " of stocks, six calendar months at least before " the death of such donor or grantor (including " the days of the transfer and death), and unless " the same be made to take effect in possession " for the charitable use intended immediately " from the making thereof; and be without any " power of revocation, reservation, trust, condi- " tion, limitation, clause or agreement whatso- " ever, for the benefit of the donor or grantor, or " of any person or persons claiming under him.

Sect. 2.

Said limitations not to extend to purchases or transfers made for valuable considerations.

" *Provisò*, That nothing therein-before-men- " tioned relating to the sealing and delivering of " any deed or deeds twelve calendar months at " least before the death of the grantor, or to the " transfer of any stock six calendar months be- " fore the death of the grantor or person making " such transfer, shall extend, or be construed to " extend, to any purchase of any estate or interest " in lands, tenements, or hereditaments, or any " transfer of any stock, to be made really, and " *bonâ fide*, for a full and valuable consideration " actually paid at or before the making such con- " veyance or transfer, without fraud or collusion.

Sect. 3.

Gifts, &c. otherwise made to be void.

" That all gifts, grants, conveyances, appoint- " ments, assurances, transfers, and settlements " whatsoever, of any lands, tenements, or other " hereditaments, or of any estate or interest there- " in, or of any charge or incumbrance affecting " or to affect any lands, tenements, or heredita- " ments, or of any stock, money, goods, chattels, " or other personal estate, or securities for money

" to

"to be laid out or disposed of in the purchase of "any lands, tenements, or hereditaments, or of "any estate or interest therein, or of any charge "or incumbrance affecting or to affect the same, "to or in trust for any charitable uses whatso- "ever, which shall at any time from and after the "said 24th June, 1736, be made in any other "manner or form than by this act is directed and "appointed, shall be absolutely, and to all intents "and purposes, null and void.

Sect. 4. But not to prejudice the universities, &c.

"*Proviso*, That this act shall not extend, or be "construed to extend, to make void the disposi- "tions of any lands, tenements, or hereditaments, "or of any personal estate to be laid out in the "purchase of any lands, tenements, or heredita- "ments, which shall be made in any other man- "ner or form than by this act is directed, to or in "trust for either of the two universities, within "that part of Great Britain called England, or any "of the colleges or houses of learning within "either of the said universities; or to or in trust "for the colleges of Eton, Winchester, or West- "minster, or any or either of them, for the better "support and maintenance of the scholars only, "upon the foundations of the said colleges of "Eton, Winchester, and Westminster.

Sect. 5. No college to hold more advowsons than equal to one moiety of their fellows, &c. Repealed by 45 G. 3. c. 101.

"And that no such college or house of learning "which doth or shall hold or enjoy so many ad- "vowsons of ecclesiastical benefices, as are or shall "be equal in number to one moiety of the fellows "or persons usually stiled or reputed as fellows, "or, where there are or shall be no fellows or "persons usually stiled or reputed as fellows, to "one moiety of the students upon the foundation, "whereof any such college or house of learning "doth

" doth or may by the present constitution of such " college or house of learning consist, shall from " and after the 24th June, 1736, be capable of " purchasing, acquiring, receiving, taking, hold- " ing, or enjoying, any other advowsons of eccle- " siastical benefices, by any means whatsoever; " the advowsons of such ecclesiastical benefices " as are annexed to, or given for the benefit or " better support of the headships of any of the " said colleges or houses of learning, not being " computed in the number of advowsons hereby " limited.

Sect. 6.

Not to extend to estates in Scotland.

" And that nothing in this act contained shall " extend or be construed to extend to the disposi- " tion, grant, or settlement of any estate real or " personal, lying or being within that part of " Great Britain called Scotland."

It may be justly deemed fortunate for the country and for posterity, that within one year after the passing of the last-mentioned statute, and for the space of 19 years following, a lawyer presided in the High Court of Chancery, whose profound learning and enlightened judgment enabled him to elucidate it with liberal precision, and whose determinations alone form the best reading of almost every clause it contains.

The act was passed in 1736. In the following year, upon the decease of Lord *Talbot*, on the 14th of February, *Philip Yorke*, Earl of *Hardwicke*, was called to succeed him, not only by the preference of his sovereign, but with the unanimous approbation of the whole bar, and probably of the nation. He continued to exercise the functions of his elevated station until November, 1756, when he resigned its honours. The integrity and ability with which he presided during a period much longer than

than that of any of his predecessors (except *Egerton*) are sufficiently proved by the remarkable fact, that only three of his decrees were appealed from, and those were afterwards affirmed in the house of Lords.

His respect for the laws, and for the justice of his country, was equal to his extensive learning; this rendered him attached to the love of those laws, and of that justice in every part; he was as tender of the just prerogative vested in the crown for the benefit of the whole, as watchful to prevent the least incroachment on the liberties of the subject. He was wonderfully happy in debating causes on the bench, which he did copiously and elaborately; nor was it necessary to repeat facts and reasonings a second time which had been stated to him once; his attention to arguments at the bar was so close, and so undisturbed by moroseness, or any passion or affection of his mind, that he condescended to learn from the meanest, whilst he every day instructed and surprised the ablest: he gave the utmost scope to objections which pressed the strongest against his own opinion, and often improved them; but his judgment was so correct and excellent, that even his unpremeditated opinions were generally acknowledged to be profound, and to turn upon the best points which the case afforded; would bear the strictest examinations when reduced into written reports; and gave the highest satisfaction to the parties for their justice, and to the lawyers for the skill and discernment with which they were formed.

Etiam quos contra statuit, æquos et placidos dimisit.

His habitual mastery of his passions gave him a firmness and tranquillity of mind, unabated by the fatigues and anxiety of business, from the daily circle of which he rose, to the enjoyment of the conversation of his family and friends with the spirit of a person entirely disengaged.

After

After he had resigned his high office he still enjoyed a pleasure in giving the full exertion of his abilities to the state, without expecting or receiving a pension of any kind whatsoever; and he seemed only to have resigned the laborious duties of the chancellor to be more at leisure to attend to such parts of the public service as were of more general use to the country. The strength of his understanding remained unimpaired to the last hour of his life, and he supported the disorder which proved fatal to him, of many months continuance, and of the most depressing nature, with uncommon patience, resignation, and even cheerfulness. He died on March 6, 1764, in the 74th year of his age.

Biog. Brit. v. 6. pt. 2.

SECTION I.

Preliminary Observations.

When we compare this statute with those which have preceded it, we cannot but observe that its spirit militates against the doctrine established by several of them, particularly the 43d of Eliz. and the manner in which we have already seen that act was liberally expounded: every subsequent act contradictory to former statutes, or which directs any new method of doing the same thing, although not in express words repealing, yet must be considered and taken as a repeal of them, so far as it contradicts them; thus the cases and decisions under the 43d of Elizabeth cannot all be taken as precedents for modern determinations; and the new act by almost subverting the old ones has opened a new source of legal knowledge, which for the sake of promoting and securing to the many new institutions of charity, which have sprung up

1 P. Wms. 249.

up within the last few years, deserves, and is the present design, to be investigated.

New institutions included in the act, whether hospitals or not.

It may not be improper to premise, that although many of these late institutions could never be named in these acts, yet from their nature, such as dispensaries, contributions for different charitable purposes, as for the relief of the poor, for the discharge of prisoners for small debts, for the sunday-schools, for the black poor, and the like, they are all subject to the same restraints of mortmain, and the direction of visitors for misemployment of their property, and are all under the regard and relation of his majesty's Attorney-General, and derive their patronage from the crown, as effectually as if they had been named in the several acts already recited. And this opinion is in a great measure confirmed by the legislature itself in the annual acts of land-tax, where it was always provided, that all such lands, revenues, and rents, *settled to any charitable* or pious use, as were assessed in the 4th year of William and Mary, should be liable to be charged; and that no other lands, tenements, hereditaments, revenues, or rents whatsoever, then settled to any charitable or pious use, should be charged.

2 Ves. 328, 552.

3 Burn Eccl. Law, 315.

The courts will expound the statute of mortmain so as to repress the mischief which gave rise to it, and advance the remedy provided for it. The mischief was, the devising lands in mortmain and creating perpetuities, which is attempted in cases where a perpetuity of trustees is raised by provisions for their successive appointments in wills. The remedy was to avoid all such dispositions in trust for any charitable uses whatsoever, using the largest and most general term as contradistinguished from religious uses. The construction of charitable uses in the statute of 43 Eliz. c. 4. goes much beyond the relief of the poor; the term extends, as appears by the preamble, to the repair of bridges, ports, highways, &c. and

1 Ba. Abr. 500. Ambl. 651. 6 East, 339. Toone v. Copestake.

and therefore implies a gift to the rich as well as to the poor; and hence a sale of lands to be applied to water-works, for the use of the inhabitants of a town, was holden to be within the statute of mortmain.

1 Ves. 218. Atty. v. Day 1748. Post. ch. 1. s. 6.

The first clause of this statute relates to gifts and conveyances of land to charities by way of donation. The legislature did not absolutely intend to prohibit all kinds of purchases of lands for that purpose, but to put them under such restrictions during the life-time of the benefactor as should restrain the too frequent alienations in mortmain.

The act was not meant solely to restrain devises of lands to charities, but also to prohibit any devise of lands to trustees to sell them, and convert the produce of the sale to such purposes. This point was decided by Lord *Henley*, in the case of *Attorney-General* v. *Tindal*, in 1764, which, as it was founded on several cases that are necessarily classed under that part of this tract which treats of money or effects to be laid out in lands, will be mentioned in the proper place.

SECTION II.

Of Purchasing Lands.

10 Rep. 30. 34 H. 8. c. 5.

It is incidental to every corporation to have a capacity to purchase and hold lands for themselves and their successors, and this is regularly true at the common law; but they are excepted out of the statute of wills, so that no devise of lands to a corporation was then good, except for charitable uses, by the 43d Eliz. c. 4. which

Hob. 136.

exception is again greatly narrowed, says Mr. J. Blackstone, by the statute of 9 Geo. II. c. 36.; so that now a corporation, whether ecclesiastical or lay, cannot purchase

chase lands without licence from the crown, though that *capacity* seems to be vested in them by the common law. But corporations in general are favoured with this privilege, to a limited extent, in the charter or statute of their foundation; and as they are a creature of the state, it may be useful, in order to obviate any doubt of the validity of such a power, notwithstanding the statutes of mortmain, to take a succinct view of this part of the royal prerogative; by which it will appear to have been exercised sometimes under a presumption of an absolute right in the crown, at other times limited, and even prohibited by parliament; again, authoritatively exercised by the crown, and at last resumed by the legislature, and granted to the crown to be exercised according to its sound discretion.

Here it may well be considered, that, wherever an act of parliament gives a particular interest or right of action to the party grieved, by the breach of it, as the statutes of mortmain, which give an entry to the next immediate lord for an alienation to a corporate body, it seems to have been always agreed, that no charter by the king could be of any force to bar the right of the party grounded upon such statute; because it was a settled rule, that the king cannot prejudice the party's interest. And yet the claim, as well as the exercise of a dispensing power, are allowed to be very ancient in England; and though they seem at first to have been copied from papal usurpations, they may plainly be traced up as high as the reign of Henry III. The practice had so much prevailed, that the parliament more than once acknowledged this prerogative, particularly during the reign of Henry V. when they enacted laws against aliens, and also when they passed the statute of *provisors*.

2 Haw. P. C. B. 2 c. 37. s. 29. s. 30. 11 Co. 98. Kelway, 184.

3 Hume, 248.

Rot. par. 1 H. 5. n. 15. Rot. par. 1 H. 5. n. 22.

But it is remarkable, that in the reign of Richard II. the parliament granted to the king a temporary power only

Rot. par. R. 2. n. 1.

only of dispensing with the statute of provisors, which was a plain implication that he had not in himself such a prerogative; and in the reign of Henry VI. the crown was, by an express clause in the act for limiting the service of sheriffs to one year, prohibited from granting any dispensation.

23 H. 6. c. 7. 1 Lutw. 198.

The judges, however, in the reign of Henry VII. and again in that of James I. ventured to flatter their respective masters with a determination that he had this absolute power. The distinction made by Sir Edward Coke was, that no statute can bind the king from any prerogative, which is sole and inseparable to his person, but he may dispense with it by a *non obstante*; as a sovereign power to command any of his subjects to serve him for the public weal, &c.; but in things which are not incident to his person, and belong to every subject, and may be severed, there an act of parliament may absolutely bind the king, as an act to disable every subject to take land of his grant or any of his subjects as bishops, as by 1 James I. c. 3. to grant to the king; this is good: for to grant or take lands is common to every subject, &c.

2 Haw. P. C. B. 2. c. 37. 12 Co. 18, 19.

The crown had been accustomed to dispense with the ancient statutes of mortmain without any clause of *non obstante*; for thereby he only relinquished that right of entry which those statutes gave him for the forfeiture, which every mesne lord might also do, as well so far as he had a right by those statutes. But the dangerous height to which the dispensing power was carried, and particularly by the last prince (James II.) in whose reign it was abolished, impelled the Commons to examine the subject with minute attention in 1685: and as one instance of it was most pressing, they fixed on that for the subject of an address, which they conceived in very respectful terms, reminding the king of his promise

Co. Litt. 99. Plowd. 502. Dyer, 269.

Hume, 240.

mise from the throne, relative "to the removal of some officers from the army who had been suffered to remain, being unqualified by the act of Charles II. against popish recusants; and that their continuance was dispensing with that law without any act of parliament, the consequences of which were of the greatest concern to the rights of his subjects, and to all the laws made for the security of their religion." 13 Rapin, 62.

The king received this address very ungraciously, and expressed himself with great warmth and vehemence; the Commons were so daunted with his reply, that they sat in silence for some time, until Coke, the burgess for Derby, said, "I hope we are all Englishmen, and not to be frightened with a few hard words;" for which he was committed to the Tower. Here the matter rested 8 Hume, 240. during the reign of James II. but as soon as William III. had accepted the crown, this dispensing power was made one of the stipulations for the recovery of public right.

It was expressly declared by the bill of rights, that no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but shall be held void and of no effect, except it be allowed of in such statute. 1 W. & M. Ss. 2. c. 2. s. 12. 1689.

This abolition of the power hitherto exercised as undoubted prerogative came in a few years afterwards to be considered in a serious light by the clergy, as tending to be a great hindrance to learning and other good and charitable works, if persons well inclined might not be permitted to found colleges, or schools, or to augment the revenues of those already founded, by granting lands to them or to other corporations then existing, or to be afterwards incorporated for other good and public uses; an act for the encouragement of charitable gifts was therefore passed, revesting in the crown this prerogative, by a full discretionary power to grant licenses to aliene in mortmain, and also to purchase, acquire, take and 1696. 7 and 8 W. 3. c. 37.

hold in mortmain in perpetuity, or otherwise, any lands whatsoever, and of whomsoever the same should be holden: and declaring such laws so aliened, or acquired and licensed, not to be subject to any forfeiture by reason of such alienation or acquisition.

This act originated in the House of Lords, where it passed with one amendment on the 13th of April, 1696: it was afterwards agreed to on the 25th of April, without any amendment, by the Commons; and Sir Henry Hobart (afterwards Chief Justice of the Common Pleas) the chairman of the committee, returned it to the House of Lords, where it received the royal assent on the 27th of the same April.

Journ. Dom. Com.

All charters of this nature since granted are of valid authority under this statute; which laid at rest all questions of doubt relative to the dispensing power, and to the consequent title of lands purchased under any such licence or charter. If, therefore, any corporation purchase lands without any such provision in their charter of establishment, or without having previously procured such licence from the crown, as the crown may be well advised by the Attorney-General to grant for that special purpose, the right of entry will accrue, and the lands so purchased will become forfeited.

See Post. c. 2. Exemptions.

Such charities as, not being incorporated, have not any such licence, are reduced to the necessity of choosing from among themselves trustees, to purchase in their own names, and take the lands in trust for the charity, to hold to such uses, applications, control, and direction, as any general court of the governors duly called shall appoint; for if they were to take the purchase in the name of the institution itself, it not being incorporated, the lands would instantly vest in the crown as a forfeiture in mortmain.

SECTION III.

Of Devises of Real Estate for Charity.

No manors, lands, &c.] The first material case that occurred after the making this statute was that of *Ashburnham* and *Bradshaw*; and as the chief question in the cause appeared to be a point of law arising on the construction of a new act of parliament, which had never come in judgment before, and to be a matter of great importance, the Lord Chancellor thought it fit, in order to the settling the law thereupon, that the opinion of all *the judges* should be taken.—Robert Bradshaw made his will in 1734, and devised divers lands, and tenements, to trustees, and their heirs, in trust, or for the benefit of certain charitable uses therein-mentioned, amongst several other trusts. The above statute for restraining dispositions in *mortmain* took place in June, 1736. In July following the testator died, having been insane from the time of passing the act until his decease, and had not a sufficiently lucid interval to make any alteration in his will. The question was, whether such gift or devise, so far as the same related to the charitable uses, was good in law notwithstanding the statute? And all the judges, except Mr. Justice Denton, who was ill and absent, certified that the gift or devise, so far as related to the charitable uses, was good in law, notwithstanding the statute; and thereupon the court established the will, and decreed that the trusts of the charities should be carried into execution, on this reasonable ground, that the will was made and dated before the act, although the testator died after it had taken effect.

9 Geo. 2. c. 36.
2 Burn Eccl. Law, 477.
2 Atk. 36.
Barn. Ca. Chs. 7.
1 Vezey, 33. Atty.-Gen. v. Lloyd.

1 Vezey, 178. But in the case of *Willet* v. *Sandford*, the testator, *Windowe*, made his will in 1734, devising the bulk of his estate to trustees, to certain trusts, and particular lands to charitable uses. The act passed in 1736; and in 1744, by a codicil, he added new trustees, and confirmed his will. The devise to the charity was declared void; for the republication of the will by the codicil, after the act, rendered the devise clearly within the statute.

1 Vezey, 225. 2 Wms. 262. In *Attorney-General* v. *Andrews*, a devise of copyhold lands not surrendered to the use of a will made before the statute was held good, as not within the last *mortmain* act, on the principles of the foregoing cases; nor within the statute of frauds; and good also by way of appointment under 43d Eliz. I have been favoured by a friend with this case in manuscript, on which account I insert it at length, in order to preserve the reasoning which it contains; but the facts on which it is grounded cannot, from the distant date of the statute, ever recur, so as to retain a devise of copyhold estate.

Atty.-General v. Andrews, 1748, MSS. William Weston, by will in 1735, devised his freehold and copyhold estates for the benefit of his daughter and the heirs of her body, &c. with remainder over to trustees for charitable uses, viz. for educating and apprenticing poor boys; he then specified his outstanding securities, and directed them to be called in and invested in the purchase of land, and appointed his daughter and others executors. The will was not attested. The daughter died first, and afterwards the testator died, without having made any surrender to the use of his will. An information was filed against his heirs-at-law and executors for a performance of the will, in relation to the charity; and though the will was proved in the spiritual court, it was proved also in this court, the probate below being material (as was admitted by the relators' counsel)

sel) because it did not operate as a will. The principal questions in this case were,

1. Whether the want of attestation and surrender were sufficient to hinder the copyhold lands from passing by this will to the charity. For as to the freehold lands (it was admitted by the relators' counsel) the will was void for want of attestations; it having been determined, that where freehold lands are devised to charities, the will must be executed as the statute of frauds and perjuries requires.

2. What passed by the bequest of the monies at interest, whether such as the testator had at the time of the will only, or whether it takes in what he had at his death.

3. Whether the bequest of the personal estate to the charity was good in law, it being after a gift to the daughter for life, and then to the heirs of her body, and the heirs of their bodies born, or to be born, jointly for their lives; and then, for want of such heirs, it is given over.

It was argued by Sir *D. Ryder*, (Attorney-General) Mr. *Brown*, and others, for the relators,—1. That attestation is not necessary in the case of copyholds; for before the statute of Henry VIII. of wills, they might be devised by parole; and though by that act they must now be devised by writing, yet the 29 Car. II. c. 3. (which makes attestation necessary) does not extend to copyholds (which pass by the custom), but to such lands *only* as pass purely by the will. Before this act all wills were good as to freeholds, if in writing, though not attested; and so it is now in relation to copyholds. It is there said, that if a will of copyhold is attested by one or two witnesses only, it is sufficient. Now, if three witnesses are not necessary, neither is one necessary: and, accordingly, in *Page* and *Tuffnell*, *April* 7, 1740, it was determined by Lord Chancellor Hardwicke, that 2 P. W. 258. 261.

a devise of a copyhold estate by the *cestuy que trust* was good, though the will was unattested. And his lordship now said, that in that case he did determine so, though before, a contrary opinion had been given in this court.

Barnardist. 12.

2. The want of a surrender does not make a will void in the case of charities. It operates as an appointment within the statute of Eliz. And in many cases the court will supply the want of a surrender, as in *Cook* v. *Araham*. [And generally in the case of charities there is no necessity of the surrender of a copyhold.]

Forrester, 35.

3. As to the extent of the bequest, this is not to be confined to the time of making the will, but it has relation to the death of the testator. All the monies at interest are given generally; and afterwards, when he particularizes the securities, he introduces it, by saying, that "the trustees may know how his estate now stands;" which word *(now)* is omitted in the bequest: this shews he meant to give all the money he should have at his death. Besides, the money itself is here given; and, therefore, though the securities may have been altered, yet the money remains, and will pass. And *Mr. Attorney-General* cited *Peirse* v. *Stablin*, where one bequeathed 5000*l.* stock generally, and purchased it afterwards, and it was held that it passed.

4. By the devise to the daughter, she takes for life only, and not intail; and the heirs of her body take as purchasers, words of limitation being added to them. The words "issue of the body" have been taken by way of limitation. And though here it is said, "for want of such heirs," the meaning hereof is, that if the daughter has no such heirs as are here described living at her death, the lands shall go over.

Such construction must be put on the whole devise as to make it operate, if possible. Besides, it is material

that

that the daughter died in the life-time of the testator, *and* then, at his death, there was no illegal remoteness: and the determination of Lord Chancellor *Talbot* in *Hopkins* v. *Hopkins*, was grounded on this principle, that wills are to be considered not as the case was at the time of making, but as it was altered by subsequent events. But as to this point, Lord Chancellor said it seemed to be at an end, by the direction of the will, that the money shall be laid out in land, and therefore it ought to be considered as such, though before the money be given *eo nomine*. It was also urged that this will being executed before the statute of mortmain (which commenced 22 June, 1736), it was good notwithstanding that act, and so it has been determined. Forrester's Cases, 44.

On the other side, it was argued by Mr. *Murray*, (Solicitor-General) Mr. *Neale*, and others,—1. That though it must be admitted that where a copyholder having the legal estate makes a surrender to the use of his will, there is no need of attesting it, because the estate does not pass by the devise; but this is only a declaration of the use of the surrender; and so it is in the case of a devise of a copyhold by the cestuy que trust, without a surrender; because in this case a surrender is not necessary, the cestuy que trust having only an equitable interest, and *equitas sequitur legem*. Yet where a copyholder has the legal estate, and makes no surrender (as in the present case), there the will ought to be attested, otherwise there will be no kind of notoriety, as there is in the case of an unattested will, where there has been a surrender. There ought to be a surrender for such a will to operate upon. And in *Wagstaff* v. *Wagstaff*, Lord *Macclesfield* declared he would not carry these cases one jot further, which it would be to make an unattested will good, where there has been no surrender. 2 P. W. 259.

2. The want of a surrender ought not, in this case, to be supplied, because the will is not properly executed, and no case has as yet gone so far: and without supplying this, the will cannot be considered as an appointment under the 43 Eliz. The court has a discretionary power in these cases; and it has frequently refused to supply the want of a surrender, as in the case of a grandchild, and on many other occasions. And though heretofore this has been supplied in the case of charities, yet it ought not to be so now, since the sense of the legislature has been declared against charities by the late statute of *mortmain* as being against the common weal.

Salk. 187.

Abr. C. E. 123.

3. By the bequest of the money at interest on government or other securities, which testator afterwards specified, only such securities are comprehended as were in being at the time of the will; and if the testator afterwards had called in the money due on any one of them, it would have been a revocation *pro tanto*, according to many determinations; though this has been doubted, where the money is voluntarily paid in. The present seems to be only a kind of specific bequest.

As to the statute of *mortmain*, it was admitted by the defendant's counsel, that if a will is made of real estate, before the act, whereby the same is devised to charitable uses, and testator dies after the statute, this is good, and so it was held in *Ashburnham* v. *Bradshaw*, 1738 *or* 1739. On a reference to the judges and the court, they relied very much on a case in Levinz, upon a will made before the statute of frauds. But a will of personal estate (as the present in part is) differs greatly from one whereby lands are devised, because both under the statute of Hen. VIII. of wills, and also under the customs of boroughs, enabling persons to devise lands, it was necessary for a man to have the lands at the time of making the will; but as to personal estates, the will must

must be taken as the estate was at the time of the testator's death.

Lord Chancellor.—I should be glad to see how far appointments to charitable uses have been held good without witnesses. In the case of an estate tail, where an appointment is made to a charity, it is good without fine or recovery, and the court will not compel the issue to join in the fine or recovery. It should seem that where copyhold lands are devised to charitable uses, without a surrender, the legal estate does not pass.

If an appointment is equivalent to a surrender, and passes the legal interest, there is no need then to supply the want of a surrender; but if the appointee may come in and be admitted without one, there will be a chasm as to the title in the court-rolls.

Lord Chancellor being doubtful as to the practice in these cases, asked Mr. Green, a gentleman at the bar much conversant therein, what the custom was where a will is made to charitable uses, without a surrender; who answered, that it was usual to admit the appointee without any surrender, uniting the admission of the testator, and his dying seised, and making an appointment.

And Mr. *Attorney-General* said, that in case of an assignment of a copyhold under a bankruptcy to a purchaser, there is no need of a surrender. But Lord Chancellor said this was under the bankrupt act, and asked *Mr. Attorney-General* whether he insisted on the heir-at-law's making a surrender. To which he replied, that he should be contented without it, but, for the greater security, would chuse to have it done, and submitted this to the court. The case was adjourned, and the Lord Chancellor desired search to be made, whether there were any cases of appointments to charitable uses without witnesses.

The

The following case is also taken from the manuscript of another gentleman, formerly very eminent at the Chancery Bar, and communicated to me by an able friend, to whom I was frequently obliged in the first edition of this work; the Chancellor's opinion seems to be here more fully preserved than in *Barnardiston*, 130.

Adlington v. Cann, MSS. 1740.

Lawrence Hollister, by will in 1725, devised his estate for the building of a charity-school, and other charitable purposes. Then the statute of 9 Geo. II. c. 36 passed; and the testator apprehending that this disposition would come within that statute, and be avoided thereby, made another will on 1st August, 1738, whereby he devised the premises to defendants, William Cann and Mary Andrews, and their heirs, without any trust appearing on the face of the will. But on the 9th of same Aug. he subscribed a writing, which was found after his death, wherein he recommends to his executor, William Cann, 'to assist Mary Andrews, and to see the will performed according to his humble request, and according to the wonted and well-disposed charitable disposition of said Cann towards all men, to bring the whole affair to its desired issue.' The testator died soon after, and the plaintiff, who was his only daughter, and heir-at-law, filed her bill to have the devise set aside, as void by the act. The defendants insisted on the will, as an absolute gift to them; and that no parole evidence of a trust for a charitable purpose was to be admitted by the statute of frauds and perjuries (29 Car. II. c. 3.): and denied their ever having seen or heard of any other writing but the above paper, signifying any declaration of trust concerning any charitable use, or that any such directions as are mentioned in the above paper were ever given by the testator to Mary Andrews.

Secret Trust.

It was in proof, that the testator had, a short time before his death, given directions for drawing a plan of a public

a public building; and several witnesses were likewise examined, to prove his intent to leave his estate for the building a school or hospital.

The question was, whether here was a specific declaration of trust, for a charitable purpose, to bring the case within the 9th Geo. II.? and whether to bring it within that statute, the trusts must be sufficiently declared within the statute of frauds and perjuries? And, lastly, whether the above paper was a sufficient declaration within the last-mentioned statute?

Lord Chancellor *Hardwicke* said, he was under some difficulty about determining this point, from fear of breaking in upon the statute of frauds on the one hand and the statute of *mortmain* on the other.

The question has arisen purely from a mistake of the testator, who thought that his first will, though made before the statute of *mortmain*, might be affected by it; which it could not have been, as was certified to the court by all the judges in the above case of *Asbburnham* and *Bradshaw*.

The first question is, whether the present case is within the statute of frauds and perjuries?

His lordship said, he thought it was; he should do greater mischief by determining it otherwise, than by leaving a loop-hole to elude the statute of *mortmain*, in some instances: devises to charities and charitable uses have been held, over and over again, to be within the statute of frauds and perjuries. It has been endeavoured, indeed, to make wills, not properly executed within that statute, to operate as appointments, but this could never prevail. And therefore in all cases of charities that have come before the court, it has been held, that the declaration of trust for a charity must be express, as the statute of frauds and perjuries directs*.

See Roberts on St. of Frauds, 352, and seq.

* 29 Car. II. c. 3. s. 7. It is enacted, that all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall

So it was determined in the case of the *Attorney-General* v. *Spillett*, heard first by Lord Talbot, and then by his lordship in 1739, though there were some very strong circumstances in that case to have supported the charity. It was said, indeed, that the words of the statute of *mortmain* are so general as to take in every trust, whether by parole or writing; and that this being a later law than the statute of frauds, is not bound to be construed by it. But he was of opinion, that the source of a trust, or declaration of trust, in the statute of *mortmain*, ought to be directed by the statute of frauds, which did *normam imponere futuris*, as to the meaning of the word *trust*, what should or should not be a trust.

3 P. W. 344. Lloyd v. Spillet.

This case established a reversionary charity in the surplus estate for dissenting ministers at Reading.

So upon the act 11 and 12 Wm. III. whereby devises in trust for papists are made void: the definition of a trust is taken from the statute of frauds. And if a bare parole averment of a trust for a charity, upon a will, was to be allowed, the statute of *mortmain* would be attended with much more mischievous consequences than ever it can do good.

The next thing to be considered was, whether this paper was a sufficient declaration of trust within the statute of frauds? which depends upon the words of it; and he thought it was not. Had the testator made a feoffment to himself, and his heirs, this paper might have been a good declaration of the use; but here we are in the case of a will, which passes both the legal and the beneficial interest to the devisee. The will is dated 1st August, and the paper the 9th August; so that if

shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trusts, or by his last will in writing, else they shall be utterly void, and of none effect, &c. &c.

the

the paper does any thing, it must enure as a revocation of the will; which it cannot do, for want of proper execution within the statute of frauds; as trust and equitable estates can no more pass by any writing not properly executed within that statute (i. e. by sect. 5. in presence of three or four witnesses) than legal ones can. And here being no sort of fraud nor misrepresentation proved to be used on the testator, he thought this was not a sufficient declaration of trust within that statute.

But supposing this a case not within the statute of frauds, and that it might admit of parole evidence to prove the intent; Is there any proof that the testator intended that the whole of his estate should go to charitable uses? which must be ascertained, and the quantum appear which he intended to give, before it can be decreed how *much* must go that way. It is expressly sworn by the defendant *Andrews*, in her answer, that the testator, once talking to her about the estate, said, that he had given her and the other defendant his estate by will, "to dispose of as they pleased;" and had at another time said, "don't dispose of too much of it." Now even admitting this not to come within the statute of frauds, still here is no rule to draw the line by, how much shall go to this charity. He may have given these two persons his estate to carry on his intent of building a school; but the quantity that shall be applied that way, he has left to their discretion: and therefore how can the court determine what part to let the plaintiff into? This is a case which can scarcely be precedented: few people will leave their trustees such unlimited power as this testator has done: the many abuses of trusts are a sufficient warning against it.

The last consideration is, what is proper for a court of equity to do in the present case. His lordship said, he was under no obligation to make a decree, as the party could

could have a remedy at law; and indeed this is a mere legal title. The statute of mortmain avoids the devises to charitable uses; so that it is the devise of the legal estate itself, not barely of the trust, which is made void, and is just the same as a devise in trust for papists, within 11 and 12 Wm. III. where not only the trusts, but also the devise of the legal estate itself is made void: In the case of *Carrick* v. *Errington*, 2 *Wms.* 361. which was upon a conveyance, the whole was held not to be void, because part of the trust was for children unborn; whereas had the trust been for all papists, the whole devise of the legal estate had been void. I can therefore do but one of two things; either retain the bill, and give the plaintiff opportunity to bring an ejectment, it being a very hard case upon her, who is an only child, and disinherited; or else dismiss the bill without costs.

The parties immediately chose to have the bill dismissed without costs.

It has been since established, that the statute of mortmain did not abrogate the statute of frauds. The circumstance of this case showed how ready the propensity was to elude the statute by creating a *secret trust*, but the vigilance of the court has since pursued and brought the reservation to light by a bill of discovery.

Amb. 20. Atty. v. Weymouth, 1742.

Sir *John James* devised lands to be sold to pay his debts, &c. and the surplus to be invested as a fund for certain charities, which he forebore to mention, as the trustees knew his designs as to charities. This charitable devise was, upon the foregoing principle, adjudged to be void.

The subject of *secret trust* for charities has been lately more fully discussed, and the doctrine settled in the following cases, which requires that they should be stated at length.

6 Ves. jun. 52. *Isaac Hawkins* devised the residue of his estates, real and

Muckleston v. Browne, Gisborne, & others. A.D. 1801.

and personal, to three persons and their heirs, whom he also appointed executors. But by a codicil he devised another estate, afterwards purchased to them upon trust for the like uses, as those to which his former estate stood limited. The heir-at-law filed his bill against them, suggesting a secret trust not explained by the will but apparent by the codicil; and also some conversations at different times with the trustees separately, and now communicated by the letters of Gisborne, in which the testator did not give them any intimation that they were to retain any thing material for their own use, but that he had public charities in view; and though it was not recollected that he had used the word "private," yet it was certain that appropriating to private charity whatever they might find themselves legally excluded from assigning to public charities, would fulfil the spirit of his intention; that one of the trustees, in expressing a wish to him that his will should specify that the bequest was not intended for their private emolument, but for charity, he intimated decidedly that it could not be done without invalidating the bequest. Whether he distinctly named the mortmain or other statutes as destroying the bequest was not recollected; and on asking for information as to the kind of charity he preferred, he replied, that they would be the best judges. He gave them reason to suppose they would have discretionary powers as to the application of it; and that one of them might keep what he pleased to himself. In one conversation it was said to him, that the real estate might be affected by the mortmain act; he replied, it was impossible, because they would have the full and legal right to the whole residue; the distribution would be their own act and deed. That he had not left any declaration in writing of his trusts, and if he had, that so far as it affected the real estates they were

were void: and the bill prayed a discovery, &c. to which the defendants and the executors demurred generally.

4 Atk. 141.

The case of *Adlington* v. *Cann*, was relied upon in support of the demurrer. For the plaintiff, it was insisted that an express trustee, if no trust is declared, cannot take for his own benefit, as *Bishop of Cloyne* v. *Young*, and *Lord Guilford's* case. Lord Chancellor *Eldon* observed, that upon the interrogating part of the bill that part did not, in the terms of it, connect itself with any trust necessarily confined to a secret trust for charitable purposes; that if all the allegations of the bill were necessarily confined to such trust, the interrogating part must be construed according to the alleging part, and is not to be considered more extensive than the propositions out of which those interrogatories arise. But it will be seen whether the allegations do not substantially embrace cases of trust far beyond the purpose, to devise on the one hand and carry into execution on the other, a mere trust for charitable uses; for stating declarations of trust effectual or ineffectual, the bill states a case in which the heir may be clearly entitled; for there is no doubt, if the trust was ineffectually declared in its origin, or being effectual becomes ineffectual, the *cestuy que trust*, or a part of them, having died in the life-time of the testator, independent of all questions as to the statutes of fraud or mortmain, the trustees would take upon trusts ineffectual in part or the whole. If it was necessary to put the case upon that ground that they had agreed to accept the devise upon such trusts as he should duly declare; his lordship was not prepared to say it is clear, that if he made the devise, meaning at the time thereafter duly to declare trusts, and it happened that he did not declare any, that sort of case would not be within the equity of this court; and whether, if they admitted his will was made upon an understanding

2 Ves. 91.
2 Ves. 495.
5 Ves. jun. 149. note 158.

standing that they would execute such trusts, the heir would not have a right to say, no trust was duly declared: the purpose therefore failed; and the trust results by law to him, not upon the intention but upon the ground that there was no intention, and he is entitled to avail himself of that. Upon that ground, therefore, his lordship declared that the bill must be answered.

Strong as the testator's purpose appeared upon *Gisborne's* letter, he did not feel himself quite equal to disappointing his heirs, and therefore he specifically devised some estates to them. If the case stood simply upon the will, the defendants were, as to the personal estate, trustees, not merely by virtue of the office, but by express bequest. The legacies of 1000*l.* to each of them in the codicil being equal legacies, the inequality in the amount of the testator's bounty, as to the real estate, would not alter the interference that they were to have, only the office of executors and the equality of the legacies would make them trustees of the residue of the personal estate. I do not know, added his lordship, a case in which a legacy by a subsequent instrument has attached a trust upon the residue under a prior instrument, but I do not know a case to the contrary; and a strong inference arises that they should not have the whole, of which the legacies of 1000*l.* were a part: and that is very material here; for it gives countenance to the first allegation in the bill, that before the will was made the testator applied to them to know whether they would take the estates upon trust, which he would or would not declare, and it raises upon just grounds and principles a supposition, that even between the dates of the will and codicil there might have been some uses and trusts either effectually or ineffectually declared, which, attaching themselves upon the gift of the residue of the personal estate by the will, would explain why the testator gave the legacies of 1000*l.*

by the codicil to them to whom, by the will, he had given the whole residue of his personal estate. Though it must necessarily be admitted, that if there were nothing more than the will and codicil, I must put this construction upon the latter, that all these words, "uses, trusts, &c." would be satisfied by that which is really, not strictly speaking, a use or a trust, but a mere charge upon the real estate: if it should be necessary to have resort to it, in case of a deficiency of the personal estate, yet upon the will and the codicil, attending to the particular nature of the expressions and connections, the particularity of the expressions, and the inference to be thence deduced, with the allegation that the defendants did undertake to take, by a devise expressive of some uses, intents, and purposes, the court is authorised to hold, that though this might have been the construction of the will and codicil alone, it may not be the construction of the whole case being taken together.

In the allegation, that no use or purpose was by the will or otherwise declared, I construe the expression "use or purpose" as contradistinguished from "trust." Though in one sense a trust is a use or purpose, it is capable of being used in a distinct sense, as I think it was by the person who drew this bill. The latter part of that passage admits of two interpretations, that in fact the testator has not declared any use or purpose, or that in law he has ineffectually declared, or that the effectual declaration made, has failed. The question as to that must be answered by looking at the whole context. I do not think the defendants bound to answer the question, whether it is not manifest by the will and codicil that they are trustees? that must be tried by the contents of the will and codicil. The letter of *Gisborne* discloses communications between him and the testator, from the spring of 1789 to the execution of the will

and

and codicil, and Gisborne appears to have enjoyed a great deal of his confidence. It is most distinctly disclosed in that letter, that the testator projected an evasion of the law. Whether he looked to private donation or public charity, whatever was the nature of the charity he meant to establish, a distinct communication appears in this letter that he dared not put his purpose in writing on account of the statute of mortmain. That is a purpose, in aiding which I can go no farther than the law obliges me, either on the part of him who projects it, or of him who promotes it by adopting the execution of it. On the other hand, I can go no farther in destroying that purpose than the law furnishes the means. But the policy of the law requires that courts of justice should distinctly state that it is incorrect conduct in both parties, both in him who projects such a purpose, and in him who carries it into execution. Though there is great weight in the argument upon *Adlington* v. *Cann*, that if a trust is declared, yet if it be so loose and uncertain how much is for charity, how much for private disposition, that the court cannot see specifically what is the subject upon which the trust is to attach, it is very difficult, I agree, to attach any trust. I am not prepared to say upon this letter alone the court would be at much loss, or would feel much difficulty upon the statement of *Browne*. An intention is disclosed in that letter not altogether consistent with the other; but it is not to be denied, that each of those papers leaves a great deal to be disposed of in charity, according to the declarations of the testator himself; and if the declaration of trust reserved to the defendants a power of disposition to such charities as they should think proper, I am not quite sure the heir has not a right to call upon them, to say whether they have done so, or mean to do so, and how much they mean to dispose of; and to give him the rest. It is Secret trust.

a fair subject of argument, whether *Gisborne's* apprehension of the testator's meaning would bind the court, or whether the court would not say, from the apprehension of the testator, as to the statute of mortmain, the purpose would apply to the whole of the property. A very material part of the bill is the allegation, that the defendants pretend the testator has, by some writing or otherwise, declared the trusts, upon which they were intended to take the residue of the real estate, and that they are willing to hold upon such trusts; and charging that the testator has not legally, or in any effective manner, declared the trust, and if he has declared them, they are, as to the real estate, of which the testator was seised at the time of his death, null and void. They might be void at his death, but good at the time they were created. Surely the heir has a right to know, whether the trusts were legally declared, and continued effectual to the testator's death. If bound to answer those questions, they may say there was a trust, a writing, and that, if effectual, they must act according to it. The heir may say the trust was not well declared, or has become ineffectual in the whole or in part. In this view of the case, beyond all question, the defendants must answer this bill; and if they must answer, as to any of the allegations, it is very unnecessary to say, at present, whether they must answer as to the other part.

I will not prejudice that part of the case farther than by saying, that upon an allegation of this kind, a trust against the policy of the law, the court does insist they shall answer it. In *Adlington* v. *Cann*, there was no trust upon the face of the will; but a paper was written afterwards, which clearly demonstrates that the testator's intention was to devote the benefit to charitable purposes. If it rested there, it is clear a man cannot by an unexecuted instrument attach a trust upon real estate.

estate. But they pleaded the statute. That must have been allowed to have been a good plea, unless the court could have said, that although they plead the statute, yet if they answer, admitting the trust, it would be fit to discuss at the hearing whether he would not give the heir the benefit of the resulting trust, otherwise he would have allowed the plea at once; for they would except, because there was no answer to the charge that the defendants knew the secret trust, &c. They must have answered those exceptions, I think, upon the subsequent cases. Secret trust.

When the cause came on again, the plea, the benefit of which was saved to the hearing, was certainly beneficial; for it alleged, that if there was nothing more in the case than a will, expressing no trust, and a paper that could not be read, and no admission of the trust by the defendants, there was nothing in the cause applying to the conscience of the defendants, or raising the argument upon the policy of the law, or in favour of the heir; that if the intention cannot be effectuated according to law, he shall take the estate upon the ground that it is not effectually disposed of. In a subsequent case Sir *Thomas Parker*, who must have known *Adlington* v. *Cann*, took upon himself to examine it, and when it was very material to be accurate upon it; and he says expressly, Lord *Hardwicke* compelled the defendants to answer. If so, we see in a subsequent case how Sir *Thomas Sewell*, no mean authority, a judge very able and conversant in equity cases, understood it, and this appears also to be the history of *Adlington* v. *Cann*, by a note of Serjeant Hill. In the case before Sir *Thomas Sewell*, the original answer simply stated the will. A further answer was required, and by the further answer the defendants stated, that there was a memorandum not duly executed according to the statute of frauds, and that memorandum did

Atty.-General v. Duplessis Park, 144.

Park, 160.

certainly point to a disposition of the real estate to charitable purposes. Sir *Thomas Sewell* went a great length upon that, I confess. If he had said, the law would authorise him to hold, that a sufficient denotation of an intention that the devisees should be trustees, the difficulty would be, how he came to read that memorandum. But he took it in another way; that as they set forth the memorandum they admitted the purpose of the testator, and put it not upon the effect of the memorandum, *vi suâ*, if I may so express it, but as taken as their admission. I doubt whether that is quite correct reasoning, but still it furnishes an authority; for Sir *Thomas Sewell* might be wrong in the fact, that that was an admission, but his opinion is an authority in point of law; that if there was an admission he would execute the trust. Then it comes to this, that the doctrine of the court is, that the defendant shall answer in such a case, and if he answers in the affirmative, there is a resulting trust for the heir. *Cottington* v. *Fletcher*, does not affect this case. That case was upon the grant of an advowson, contrary to the policy of the law, by a Roman Catholic, in trust for himself; afterwards he turns Protestant, and desires a discovery as to his own act. The defendant put in a plea of the statute of frauds, but by answer admits the trust. Lord Hardwicke is made to say, that upon the admission he would act. I do not know whether he did act upon it; but it is questionable whether he should, for there is a great difference between the case of an heir coming to be relieved against the act of his ancestor, in fraud of the law, and of a man coming upon his own act under such circumstances. It is there said, it might be different if it had come on upon demurrer. The reason given is, that as this assignment was done in fraud of the law, and merely in order to evade the statutes; it was doubtful whether, at the hearing, the plaintiff could be relieved.

Cooth v. Jackson, 6 Ves. jun. 12.

relieved. Lord Hardwicke means to say, that if the defendant admits the trust, though against the policy of the law, he would relieve; but if he does not admit the trust, but demurs, he would do what does not apply in the least to this case; the plaintiff stating, he had been guilty of a fraud upon the law to evade, to disappoint the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act, but would say, "let the estate lie where it falls." That is not this case. Secret trust.

Then, as to the principle, why should it not be so? Surely the law will not permit secret agreements to evade what, upon grounds of public policy, is established.

Is the court to feel for individuals, and to oblige persons to discover, in particular cases, and not to feel for the whole of its own system, and compel a discovery of frauds that go to the roots of its whole system? Suppose the trust was to pay 100l. out of the estate, and the devisee undertakes to pay it, if it is not inserted in the will, this court would have compelled an answer on the ground that the testator would not have devised the estate to him, unless he had undertaken to pay that sum. See cases of that kind referred to in the note. 3 Ves. 38, 39.

The principle is, that the statute shall not be used to cover a fraud. If that is so between individuals, and upon an individual claim, there is surely a stronger call upon the justice of the court to say upon a private bargain between the testator and those who are to take apparently under his will, which is to defeat the whole of the provisions and policy of the law, that they shall be called on to say whether they took the estate, as they legally may not do, for charitable purposes. It is very

difficult to say, that if the justice due to individuals obliges them to disclose in the one case, the justice due to the public shall not oblige them in the other. I am very glad to find upon the authorities that they are to make the disclosure. It is difficult to say, in sound argument, that the principle of policy is not sufficient; but I do not mean to decide upon this. The other grounds that I first stated are quite sufficient. If I am bound to say whether the bill stating the letters does or does not make a difference, I can find no authority that the defendants shall not answer whether they put the declaration of trust in writing. Upon the former of these grounds, therefore, this demurrer was overruled.

9 Ves. jun. 516. 1804. Strickland v. Aldridge.

The power of the court to compel a discovery has been since also recognised and enforced upon a verbal agreement between the testator and devisee, the former, by will in 1802, devised to him in fee certain lands, on which the devisee had agreed to erect a chapel.

Upon a bill filed by the heir-at-law for a discovery, and to annul this devise, to which the statute of frauds, 29 Car. II. c. 3. was pleaded, the Lord Chancellor held, that it would be a strong proposition that the providence of the legislature, having attempted expressly to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as this. The statute was never permitted to be a cover for fraud upon the private rights of individuals; and though within the intention it cannot be said a trust is declared, under these circumstances it is clear a trust would be created, upon the principle on which this court acts as to fraud. In the ordinary cases of estates suffered to descend upon secret undertakings to do acts in favour of individuals, the court compels a discovery and application. It would be singular if the court would protect them, and would not act to prevent a fraud upon the law itself. But it is

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not necessary to decide this case upon the dry principle: the cases alluded to in *Muckleston* v. *Browne*, being authority upon it. In *Adlington* v. *Cann*, Lord Hardwicke was clearly of opinion, that there being nothing in the will attaching a trust, if the testator afterwards, by an unattested paper expressing his own intention, not communicated, said, the purpose was to devote the estate to a charitable purpose, the devisee might object, that he had taken under a will well executed; and the subsequent paper was not well executed. But this is perfectly different from the case of a devisor expressing in the paper a trust, which by contract with the devisee led to that devise; and Lord C. B. *Parker* accordingly said, Lord *Hardwicke*'s opinion was, that such a bill must be answered; and Sir *Tho. Sewell* meant to follow it. I formerly expressed doubt whether he rightly decided upon the principle; but the principle I took to be clear law, and that is sufficient.

Attorney v. Duplessis. Park, 144. 6 Ves. jun. 68. Ibid. 68. Bishop v. Talbot.

The plea was ordered to stand for an answer, with liberty to except; and the defendant to make what he could of praying the benefit of the statute in his answer. We may now proceed to the other cases.

1767. Jones v. Williams. Amb. 651.

John Williams, by his will, gave 1000l. to arise by sale of his real estate, for the purpose of bringing spring-water from St. Arvan's, or elsewhere, to Chepstow, for the use of the inhabitants for ever.

Lord Chancellor Camden defined charity to be a gift to a general public use, which extends to the poor as well as to the rich; of which there are many instances in the statute 43 Eliz. as for building bridges, &c. the supplying water is necessary, as well as convenient, for the poor and the rich: and on these grounds he declared the legacy within the statute of *mortmain*, and void.

Atty.-Gen. and Wardens of St. Saviour's v. Goulding and another.

Hannah Allen gave the reversion of nine freehold houses, eight to eight poor people that had paid most

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and longest to the poor's books in *St. Mary Overy's*
2 Br. Cha. 428. parish, as the books should prove, and the corner house (the 9th) to repair them; and *gave* the dividends of 800l. 4 *per cent.* annuities, after decease of a tenant for life, to the eight houses for ever, to each house 4l. every year for ever, as the bank pays the dividends.—*Gave* to the poor of the same parish the rent of her leasehold in Park-street.—And then gave coals and money to certain poor of same parish, and *what was left* to be given to the poor in smaller sums.

Mr. *J. Buller.*—The questions are, Whether the gift of the 800l. can be supported; for this purpose it is argued not to be within the statute of *mortmain.* With respect to the houses, the gift of them is void; then, if the gift of 800l. cannot be applied according to her disposition, another question arises, whether the court is to apply it to some other matter *ejusdem generis.* The court has certainly thought it could vary the use; but the rule may be drawn from the cases, that wherever the court had directed the sum given to be applied to a different use, there has been proper ground for the court to say, the use to which it has been applied is consistent with the use declared in the will: but there have been subsequent cases which have varied the rule; where, according to the intention of the testatrix's applying the fund otherwise than to the persons inhabiting the houses, would be contrary to that intention, the inhabitants of the houses being the principal objects of bounty, if they cannot be supported, it is not to be given to the poor in general.

The second question is, Whether the testatrix has given the residue to the poor. It is impossible to put any other construction than that of the defendant's counsel (*viz.* the bequests being attached to the nine freehold houses, and therefore void, submitted that the residue

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was not void); the small sums given are out of a particular estate. In expounding the words of the will, it is necessary to take the whole of the will together. The testatrix begins every new sentence with the words *I give*; this helps on to the true sense of the will: "what is left," only signifies what is left of that subject.—The bill was dismissed.

Where an estate be given on condition, and the devisee take possession of it, he is bound to perform that condition, though a loss accrue thereby. Michael. Term, 1790. Atty.-Gen. v. Christ's Hospital.

An estate being devised to Christ's Hospital on condition of maintaining six children from the parish of St. Leonard, Shoreditch, and the Hospital having taken possession, the rents at first proved insufficient to maintain the number; the Hospital had maintained only *three*; and an account having been exhibited to the governors, the latter had been satisfied. But upon filing the information, it was found that there had been a mistake in the account, the rents had not been expended, and it appeared the rents were not sufficient to maintain the whole number.

Lord Chancellor thought, whether the rents were or were not sufficient to maintain the number, the Hospital having taken possession of the estate, was bound to perform the condition, and that they should have considered of that previous to taking possession.

A devise over of lands to a charity does not defeat the intermediate life estate.

W. Phillips devised to Reverend *Adam Aldridge* certain lands to hold to him for his life only, on the express condition, that he do, without delay after the testator's death, convey the same to trustees, to take place at his death, for the use and support *of the preaching of the* word of God at the meeting at *Lyndhurst* for ever; and in case such preaching should be discontinued, he directed Doe ex dem. Phillips, v. Aldridge. 4 T. Rep. 264. 1791.

ed the same to be applied towards a school for teaching poor children at *Lyndhurst* for ever; and gave Aldridge full and absolute power to settle the same accordingly. "And I further expect that he (the defendant) will, with the help of God, after my decease, without delay, settle and forward every thing in his power to promote and carry on the work of God at Lyndhurst aforesaid, *both in his life time* and *after his decease*. And if it should so happen that I have not left any of the aforesaid legacies in a lawful and legal manner, to prevent any advantage being taken thereof, I do hereby give, devise, and bequeath, such legacy or legacies unto the said W. Bowyer and A. Aldridge, *in trust*, to be disposed of by them at their discretion for ever."

The court (Ashhurst and Buller only present) held, that though the subsequent limitation was void, the defendant's life estate was clearly good; that the religious persuasion of the defendant raised no ground of objection to his taking the estate; and that the devise over to the school only related to the limitation after the defendant's death.

The reporters, in a note, give an opinion, that the last clause appears fraudulent, as being an intended evasion of the statute, grounded on *Atty.* v. *Tyndal*, and that it is distinguishable from *Adlington* v. *Cann*, inasmuch as this is devised expressly in trust.

Amb. 614.
3 Atk. 141.

Hilary Term, 1791. Leacroft v. Maynard. 3 Br. 233.

The testator gave several legacies by his will, which he directed to be raised out of his real estate; and, among others, a legacy of 1000l. to the hospital in the county of L. and specifically bequeathed his personal estate. The legacy was of course void by the statute of mortmain. But the testator, by a codicil, revoked this legacy of 1000l. to the hospital in the county of L. and, instead thereof, he gave the sum of 500l. to the hospital in the county of N. without mentioning any particular

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fund out of which the same was to be paid. By the same codicil, he revoked several other legacies, and, instead thereof, gave smaller legacies to the same legatees, without mentioning any fund out of which the same were to be paid. On behalf of the hospital of the county of N. the Attorney-general contended, that the legacy, being given generally by the codicil, must be payable out of the estate; and that it might be reasonably supposed, that after making his will the testator was apprised of the invalidity of the charitable bequests charged on his real estate, and therefore revoked them, and bequeathed other legacies generally out of his personal estate.

But Lord Chancellor Thurlow thought that the codicil only meant to alter the quantum of the legacies in some cases, and the objects of them in others, but not the fund out of which they were to be paid; and that, therefore, the legacy to the hospital in N. was void.

An estate was devised to a corporation (which cannot take by the statute of mortmain), in trust, not for charitable, but for private uses; the uses are not defeated by this deficiency of the trustee; but the trust is sufficiently created to *fasten* itself upon any estate the law may raise: this is the ground on which courts of equity have decreed in cases where no trustee is named: and therefore the heir-at-law becomes trustee to the uses of the will. 1 Bro. Cha. Rep. 81.

In the case on the will of Sir *John James*, a real estate was to be turned into money by a limited time, and then for the benefit of two hospitals: Lord Chancellor Hardwicke held this to be within the statute. 1 Ves. 109.

If a person, who has defrauded a charity of any bequest or otherwise, purchases land in another's name, and dies; his heir procures him whose name was used to sell the land to another, and so the heir receives the pro- Fraud. Duke, 185.

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duce thereof; this money in the hands of the heir shall be assets in equity to recompense the father's fraud: so if the party whose name was used reconvey to the heir, the land shall be assets in equity, because he comes in upon a trust descended.

4 Brown, 394. 1793. Blandford v. Thackerell. 2 Ves. jun. 238, S. c.

A bequest of real and personal estate, in trust, to take a house on lease or otherwise, and establish a school for the reception of the children and grand-children of the testator's relations, naming them as they should attain the age of seven years, until fourteen years, and then put them out apprentices, and admit others as the yearly income would allow, &c.

This was held to be good as to the particular objects only, and bad as a general charity. Lord *Thurlow*, chancellor, said, he could only devise a plan for the education of the objects of the testator's bounty, and direct an enquiry who are such: as far as it tended to establish a charity for general purposes, it was void by the statute of mortmain, and dismissed the bill as to the *Attorney-general*.

4 Brown, 526. Atty. v. Williams, 1794.

But in a subsequent case, a gift of stock bequeathed for the benefit of a son for his life, with remainder to his children; and in default of any, then to be applied towards *establishing* a school for the poor children of a parish:

Lord Thurlow thought that under this disposition he could not have directed any part to be applied to the purchase of land or building—that the master might teach in his own house or in the church; and therefore he ordered a scheme to be laid before the master, which should not include the application of any part of the dividends to the purchase or renting land.

4 Brown, 412. Atty. v. Hartley, 1793.

Samuel Travers, by will in 1724, devised the residue of his real and personal estates in trust, to settle an annuity of 60l. for each of seven gentlemen, to be added to

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the poor knights of Windsor, issuing out of an estate of 500l. per annum in Essex, and praying that his majesty would incorporate them, and enable them to hold lands in mortmain; and that a building, the charges whereof should be paid out of his personal estate, should be erected near the castle for their habitation, who were to be superannuated or disabled lieutenants of English men of war, and gave the rest of his estates to Christ's Hospital, for educating boys in the mathematics.

In 1729 a decree established this will; and *Holditch*, the surviving executor, afterwards died, leaving a will, by which he stated the intricacy of *Travers's* affairs, and the long depending litigations thereon, and considering his relations who wanted assistance, and deeming the bequest for Christ's Hospital the best, he bequeathed the sum of 8000l. stock in his name, and 2000l. cash towards the uses of Travers's will; the bill having stated that the estates were more than sufficient for the charitable purposes of the will.

Lord Thurlow.—If the testator might be allowed to explain his own meaning, the court could not in justice apply the legacies to any other charity than that of Christ's Hospital. A question might have been seriously made, if Travers's estate had not been sufficient for the establishment of the charity for the poor knights; but when the gift is to two purposes, the one good and the other bad, the court would never apply it to the one which is bad.

The corporation of London, by their charters, may purchase lands in mortmain to the value of 200 marks per annum; and hence Sir R. P. Arden, the master of the Rolls, took occasion to notice, that some had set up a doctrine that lands in London were not within the statute of mortmain, and might be devised to charities; but hat, on looking into the last act (9 Geo. II. c. 36.) which

which cleared all the doctrine on the subject of mortmain, he was decidedly of opinion, that lands in London were not exempted by that act, and that no customs of the city could be set up, for they were not reserved out of the act.*

6 Ves. jun. 194. Townley v. Bedwell, 1801.

A trust of real and personal estate, for maintaining a botanic garden at Stockwell, which the testator conceived would be for public benefit, was declared void.

10 Ves. jun. 22. Atty. v. Stepney. 1804.

Bridget Bevan, by will in 1779, devised a house in Carmarthen to trustees in fee, to deposit therein all the bibles, testaments, and other religious books and tracts, for the use of the Welch charity-school, for the increase and improvement of Christian knowledge, which she should have at her death, and all other books and tracts, as in pursuance of the trusts, should be purchased or given for those charitable purposes, and for that purpose her servants were to live there, who should look after the books, and she gave her residuary personal estate for the use of those schools as long as they should continue, and for the increase, &c. as the trustees should think conducive to the said charitable purposes, with consequent directions.

Upon the enquiry directed into the nature of the charity, it appeared that the institutions or establishments were generally known by the name of the "Welch Piety," or the "Welch Circulating Charity Schools;" the nature and purposes of which were, to teach the poor ignorant people the Welch language, and to teach men, women, and children of all ages to read; who, by reason of their poverty, were unable to pay for learning, and in some places to write, and for that purpose to find them bibles and other religious books, and also to teach them the church catechism, and to instruct them in the prin-

* Sitting at Rolls after Michaelmas Term, 1798.

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ciples of the Christian religion according to the church of England; and that the institutions were commenced by *Griffith Jones*, in 1739, with the assistance of the society for the promotion of christian knowledge, and the voluntary contribution of himself and others, and that the manner in which they were conducted by G. Jones was by sending Welch school-masters to the several parishes in North and South Wales to open schools at the request of the officiating minister and parishioners, who sent petitions for that purpose; appointing inspectors to examine the scholars, and to see that the masters attended to their duty.

Lord Eldon, chancellor, said, The establishment involved circumstances to be looked at with great jealousy, conducted under no authority, the school-master appointed under the sanction of no licence, the nature of the books beyond bibles and testaments not ascertained, and the residence of persons sent to different parts regulated upon a system directly contrary to the establishment of this country, which gives the school-master a connection with the place for life. That this case differed from *Brown* v. *Yeale*. If there was nothing more in this will I should be bound to say, that whether there is more or less objections to the words "other religious books and tracts," there is a denotation of a religious purpose, to which the fund may be applied, with an option how it should be applied; and I must execute one term of that option.

The next objection is, that the testatrix contemplated a charity that was to have continuance; and did not, if it was not to have continuance, devote it to any charitable purpose whatsoever. But upon the whole she contemplated the two events, that it might or might not have continuance, and when the charity subsisted upon voluntary contributions, of necessity it could only last

while they lasted; and she meant, looking to the continuation of the subscriptions, but knowing they might fail, that as long as her personal estate would supply the purposes of this charitable institution so long it should be applied. That, therefore, is no objection. I am also of opinion, that there is expression enough in this will to compel me to say, that even if that charity had not continued, and she meant, it should be applied to that; she yet meant more; and has provided for charitable purposes that might or might not be connected with that charity; and the distribution of books for the promotion of christian knowledge is expressed so, that it appears she did not mean her purpose to fail, if the particular mode of promoting christian knowledge by this plan as to Welch schools did not take effect. Therefore, even if those charities had ceased, this property must be applied to the charities to which she was adverting. If it were otherwise, it would be very difficult to say it should not be applied to charity; that is, that a discontinuance of the charity operated by her own act, would authorise her to take the personal property of the testator, which she ought to have applied, to give continuance to the charity as long as it could continue.

The next consideration was, whether, upon the whole taken together, this charity is so ingrafted into, connected with, and placed upon, an establishment in real property, that the charity cannot subsist, as the real estate is so given. It is not necessary to be executed in that house; she meant it to be subservient to the distribution of books, but it is not necessarily connected with her purpose, for the will contemplates the time when the charity might continue, and the house might be no longer applicable. Next contemplating the circumstance that the charity might not continue, she meant to give her property generally to charitable purposes, connected with

Blandford v. Thackrel, ante 126.

with a scheme for the promotion of christian knowledge. *Upon* the whole, therefore, there is not enough to bring it within the authority of those cases, where the principal devise of the land having failed, the bequest of the personal property is so connected with it that it must fail too. There is enough in this will to give the personal property to charitable purposes connected with the plan of promoting christian knowledge. They were directed to propose a scheme, regard being had to the species of charity in her contemplation, and to necessary checks upon the institution, so as to render it conformable to the establishments of the country. An unlicensed school would not be consistent with that view, which this court ought to take of such an institution, carrying it into effect in the execution of such a plan.

A devise of a reversion in land to trustees of a methodist congregation, to be applied as they should think fit, is not bound by the statute of mortmain. This was held upon a special case reserved from the Coventry assizes, upon an ejectment brought by the trustees against a person in possession upon the will of *F. Faulkner*, who, in 1765, devised the lands in question to trustees after the decease of his wife, to raise a sufficient sum thereout to pay legacies, "and the overplus or reversion of the premises to be applied by them, and the officiating ministers of the congregation or assembly of the people called Methodists, that then usually or should for the time being assemble at *Longford*, and as they should from time to time think fit to apply the same," with power to appoint new trustees in case of death, and appointed his wife residuary legatee and sole executrix.

It was contended that this was not within the statute, because the uses were indefinite, (viz.) as they should think fit to apply the funds. The application being in their discretion, they may apply the funds to other than

Morice v. Bishop of Durham, 1 Vezey, jun. 399. N. S.

charitable uses, to acts of benevolence and liberality, which have been considered not to be charitable uses.

The court thought that the application in this case was left to the trustees still more indefinitely than it was in that case. As to the legal estate it was held to remain in the trustees to reimburse themselves the payment of debts and legacies. If it were a devise to charitable uses, then the legal estate resting in trustees would repeal the statute.

The court resolved, that this was nothing like a devise to charitable uses. The trustees might apply the estate to any use they thought fit. The will did not aim at confining them to apply it to charitable uses; it was left to their caprice, and unless the court could say that it was a devise to a charitable use, it was not within the statute.

Doe ex dem. Toone v. Copestake, ante 94. 6 East, 328. 1805.

The trustees recovered at law, however chancery might afterwards dispose of the fund.

SECTION IV.

Of Devises of Rents, &c.

Rents.] By this word in the outset of the act, it is clear the legislature meant to restrain any bequest of a lease, or a leasehold term, or premises held on lease for years, or money to be laid out in the purchase of a lease for years, to a charity; for though that is merely personal estate, yet it is an incumbrance upon the land, and savours of the realty, and the act forbids the giving any charge or incumbrance *affecting any lands*: and if the rents should remain unpaid, a charity could not proceed by distress; for this would be putting itself in the condition of an owner of land, which it could not take by devise, or purchase. But a charity may hire a house or

3 Vezey, 183.

lands

lands in the name of some of the trustees; and if they are disturbed in their possession, they will be accountable to the charity for all the damages they shall recover against the trespasser. Duke, 148.

But an estate held for charitable purposes, prior to this act, will still be preserved thereto, and the court will always support a charity whether incorporated or not, with its utmost aid, and will rather settle its right, than dismiss an information. Yet where a parish had formerly purchased lands for a charitable use, and afterwards, when the rents were much improved, the vestry raised a sum by annuities, and the trustees, by their order, charged these lands as security for them, the parishioners filed a bill to set aside this contract as a breach of their trust, but their bill was dismissed. 1 Vezey, 48. 72. Prec. Cha. 226. Atty. v. Hart, 1703.

Previous to the surrender of all the charter-lands of *Newcastle-under-line*, to the crown, in 1684, a lease for 1000 years was privately granted to one Ballard and others, in trust to permit the corporation to dispose of the rents and profits thereof, for the maintenance of a minister, and relief of the poor inhabitants of the borough, in such manner as the corporation should think proper. The lease lay dormant many years, till the executor of the last surviving trustee assigned it to *Offley*; and during the interval the corporation continued in possession of the premises, and managed the estates themselves, as they had done before; out of which they maintained the poor, for whom there was no rate. Information was filed against the corporation, to establish the lease and assignment for the residue of the term, and the charity to which the lands were subject, &c. Atty.-General v. Lord Gore. Barn. Ca. Cha. 151.

As to the charity, Lord Chancellor *Hardwicke* said—It has been said, that whatever becomes of the term, or the assignment, it appears that the estate was applicable to a charity, and that upon that ground this court ought

to interpose. And in that it has been rightly said; for if an information is brought in the name of the Attorney-General, and it appears that there is a charity which this court ought to support, though the information is mistaken in praying such relief for the charity which cannot be had, yet the court will not dismiss the information, but will support the charity in such manner as can be by law. It has been said, that there does not appear to be sufficient evidence to shew, that this estate belonging to the corporation was subject to a charity; but that does sufficiently appear.

Ibid. 490.

It is recited by the lease of 1684, that the issues of these lands were employed towards the relief of the poor inhabitants of the borough, and the minister of the town, and other pious uses. This is evidence, that antecedent to the lease the rents used to be employed in that manner. And though it is suggested that this is a fiction in the recital, yet, his lordship said, he would not presume it to be so, unless evidence had been shewn, that before the making that lease the rents and profits were applied in a different manner; but no evidence of that sort has been given. And it appears too, from expressions dropped in the entries in their books, that some of their estates were given them by private donors for charitable purposes. The usage likewise since that time is evidence of the usage precedent; namely, that the rents and profits were so applied before that time; and since that time the profits of these estates have been employed for this purpose.

The minister has been maintained out of them, not indeed by having a certain allowance, for sometimes he has had 20l. sometimes 15l. per annum, and sometimes nothing; and the poor have been maintained out of them constantly. There have been no instances of a rate in this town made for their relief.

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For these reasons, his lordship's opinion was, that the charity must be established; however, it deserved consideration in what manner it should be established. He said, the charity must be so, which is for the support of the minister; the difficulty is concerning the quantum he must have. The right way is to decree these estates to be subject to the maintenance of the minister, and the other charitable purposes, according to the discretion of the corporation; with liberty to apply to the court in case the corporation do not exercise their discretion in a reasonable manner. And so decreed.

A devise of the whole profits of an estate to charity; if *the rents increase they* go to increase the charity.—Lord Hardwicke, C. 1753. Atty. v Johnson. Amb. 190.

Sir David Williams, by will, 15th Jan. 1612, devised the whole profits of the tithes in *Gwenther* in *Brecon*, to be disposed of for ever to the uses thereafter specified; and then gave to several charities and other public uses several certain sums to be paid annually; all which sums taken together made up the value of the tithes at that time. The tithes had since been greatly increased, and then produced annually more than sufficient to answer those particular sums in the will.

Query, Whether the surplus should be applied in augmentation of those uses, or should go to the heir-at law? The case cited at the bar, of *Thetford School*, 8 *Co.* 130. is to the purpose: but a difference argued, that the estate in that case was given to feoffees. In this case the heir-at-law is the trustee; and testator might intend, if any surplus, his heir-at-law should have it. But in *Thetford School* case the surplus must have gone to the feoffees. Indeed, at the time that case happened, courts of justice had not discovered that the feoffees would be trustees for the heir-at-law of the surplus, if there should be any. But this case is stronger than that: for the

testator declares the whole profits should be applied; and being the case of tithes, it is much stronger still, because tithes are uncertain, and might by this time have been of much less annual value, by changing the arable into pasture, &c.—It is a clear case.

Refer it to the Master to, &c. But I do not intend all the uses should be proportionably augmented; such as 10s. for an annual sermon, &c. need no greater allowance, unless, as the clergy in Wales are in general ill provided for, the augmentation to be considered as adding to his provision.

This case was authority for a subsequent decision, in *Atty.* v. *Sparkes*, by Sir John Strange, who sat for Lord Chancellor Hardwicke: where the rents and profits had increased, the augmentation was decreed in favour of the charity, which must have borne any loss by a decrease.—*Vide Atty.* v. *Mayor*, &c. of *Coventry*: *Arnold* v. *Atty.* in 1753.

2 Vern. 397.

A lease for years held under the Crown of the right of laying mooring chains in the river Thames was devised to a Charity.

1750.—Negus v. Coulter, Amb. 367.

Sir *Thomas Clarke*, master of the rolls, held this to be clearly a franchise, like a market, which may be in other persons than the owner of the soil that makes it unnecessary to consider in whom the right of the soil is. It is an inheritance vested in the crown, and granted out for years; the rent is reserved to the king, his heirs, and successors, payable at the Exchequer. This put an end to the only question which was made on behalf of the charity, that it was no part of the land. The chains being moveable makes this franchise no more personal than fairs or markets are. This is a grant of an interest in the inheritance.

In *Hall* v. *Grey-Coat-Hospital*, 1747, *Fortescue*, master of the rolls, was of opinion, that a *mortgage in fee*

fee is within the statute of mortmain. In *Atty.* v. *Merrick, Sir John Strange* considered a mortgage in fee to be an interest in the land.

And where an estate is granted or devised for a charity, and the rents are afterwards increased by the trustees, there is no resulting trust for the heir-at-law; but the charity shall have the advantage of the surplus. The foundation-school at Newport, established by William Adams, under a deed in 1656, and subsequent charter and act of Parliament; and by another deed placed by him under the direction of the Haberdashers' Company, during his life-time, they were to receive and dispose of the rents and profits in the payment of the several yearly sums after-mentioned, and had power to let the land, and to make leases, reserving the rent of 175l. or more, exclusive of taxes, and pay 20l. a year to a preacher, and other sums for a schoolmaster and usher, and for four exhibitions, and other stipulated uses. The rents amounted to the same as the sums thus directed to be paid, and at their expiration the Company increased the rents to 400l., and had applied the surplus to their own use, which was now claimed by the heir-at-law; and a bill was filed for an account, and to establish and increase the charity; and the question was whether the testator's intention was, that the whole rents should go to the charity. All cases of this kind resolve themselves into the intention of the donor.

Atty. v. Haberdashers' Company, 4 Brown, 103. 2 Ves. Jun. s. c. 1. 1792.

Lord Commissioner Eyre said, he could not bring his mind to think there was any resulting trust for the heir-at-law, according to the general intent of the parties, to be gathered from both the instruments taken together. The import of the first deed was, to convey the whole estate to the charity. If nothing more had been done, all that would have been necessary would have been to

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have come here to have a plan formed for carrying it into execution; but the second deed shews it to be his intention to have the disposition of the rents and profits for his life, making the payments for the charity. He did afterwards make a lease of it to a relation, reserving 175l. rent. When these objects were satisfied, the trusts were secured as far as it was confined to 175l. a-year; and then the general trusts in the first deed were to be executed. With respect to the heir, there could be no intention in his favour. It is argued on the ground of omission, because there is nobody else to take. In the usual case, the surplus results to the charity; it is not necessary to look further for objects: it must be applied for the benefit of the charity, either to extend it to new purposes, or, which is better, to encrease the present provisions. The charity being limited for a time, the accumulation must go to the purposes of the charity. There is no such necessity that we must decree it to the heir for want of objects; and therefore there is nothing resulting to him—therefore there must be an account of the rents and profits, &c. And the other lords-commissioners *(Ashhurst and Wilson)* consenting, decreed accordingly.

Consequent to this principle of the encrease of rents belonging to the charity to whom they were devised, arises the improvements of charity estates; which improvements the trustees are bound to regard, as to all land held in mortmain, without adding to the lands: for whatsoever is already in mortmain is to be improved, but cannot be augmented.

3 Ves. jun. 187. Atty. v. Parsons, 1803.

Edward Tawney having by deed, inrolled in 1797, established alms-houses in *Oxford*, afterwards by will in 1800 gave the interest of stock to the alms-men, and the remainder of such interest to be laid out in rebuild-

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ing, repairing, altering, or *adding to* and improving the houses and ground, for their benefit; and the residue of his estate to his nephew and niece.

It was contended for the charity, that in the cases before Lord Hardwicke, it is taken to be clear, that where there is land in mortmain, there is no objection to repairing, improving, and even building upon that land, according to *Attorney* v. *Bowles*; and the late cases take the same course against the opinion of Lord *Northington*, in *Attorney* v. *Tyndal*, and the subsequent cases.

2 Ves. 547.
2 Ves. 162.
Am. 614.

On the other side it was suggested, whether under the words "adding to" the testator did not intend that the trustees should not, if they thought fit, purchase land for the charity, and then one object being illegal, whether the whole is not vitiated. That Lord *Northington* held the object was to prevent the melioration and improvement of land in mortmain.

Lord *Eldon*, chancellor. In the present state of the doctrine of this court, as the testator had in his lifetime effectually conveyed the land, so as to satisfy the statute for this charity, even if no will had been made for the purpose of maintaining and supporting these poor men and women, the will being intended only to operate as prescribing the mode in which they are to be maintained and supported, this bequest, according to the current of modern authorities, so far as it is to be understood not to direct purchases of land to be made, is good: but as far as the words *adding to* relate to some part of the context, it is not good; for it is only adding to messuages, which I may consider to be upon the ground already in mortmain: but it is "adding to and improving the messuages or tenements, ground and appurtenances." I agree with the late cases, which go a great way to establish, that the court cannot put such a construction

construction upon the word "erect" as was put upon that word in former cases; and that, *prima facie*, the testator must be taken to mean by that word, that land shall be bought. I think the good sense is with the later cases; requiring that the testator himself should have manifested his purpose to be sufficiently answered, if they could hire or beg land, according to the expressions in the different cases. In this case it is clear the testator has adverted to land already in mortmain, adverting to his own deed.

Amb. 373. *Harris* v. *Barnes*, *Attorney* v. *Chester*, and many other cases, establish, that subsequently to *Attorney* v. *Tyndal*, at least a bequest of money, to be laid out as in this instance, is good. I am disposed to follow the later authorities, which are very numerous. In *Attorney* v. *Nash*, though the demurrer appears in the book to be allowed, without any reasons, I have reason to know Lord Thurlow's opinion was, that if a testator directs a school to be built, and does not advert himself by words in his will to a purpose, that the land is to be acquired otherwise than by purchase, you ought to infer, that he meant it to be acquired by purchase; and then it will not do: therefore declare the legacy of stock is good, so far as to the payment of 20l. a-year each to three poor men and women, according to the will; also so far as the surplus is directed by the will to be applied in rebuilding, repairing, altering or improving the messuages, tenements, grounds, and appurtenances; and so far as the additions directed by the will shall be made upon the land conveyed by the testator for the better residence of such poor men and women: but that it is bad, so far as any additions are to be made to the ground, by acquiring other land.

11 Ves. jun. 241. Atty. v. Whitely, 1805. The EXTENSION of any charity beyond the limits prescribed by the founder has always been viewed by the

the court with great caution and delicacy, as it tends to change the application intended of the funds, as well as the original plan. This can only be done where it is quite clear that by a strict adherence to the plan, the general object of it will not be destroyed: and the bare notion of advantage to inhabitants or others will not warrant such an extension. This point was well considered, in an application for leave to appoint masters to teach the modern languages of French, German, &c. in *Sheafield's Free Grammar-School*, at *Leeds*, which was founded in 1552, for the children of that town, where the tuition had been confined to the Greek and Latin languages only, and did not extend to any other branch of education whatever.

The town having very much increased in its trade and population, as well in respect of its inland, as of very extensive foreign trade, carried on in a direct manner to most parts of Europe, independently and without the intervention of London, the learning of the French, and other modern living languages, became a matter of great utility to the merchants of Leeds, and to such of the inhabitants as were concerned in its trade, and a very useful part of education to the youth intended for trade; and therefore their free grammar-school had become insufficient for the purpose of giving the necessary and most suitable qualifications to the rising generation of that town and its neighbourhood. And it appeared, also, by the master's report, that after a sufficient maintenance was provided for a master and usher, there would be a surplus arising from the funds of the charity, which might be usefully applied in salaries of such additional masters as might be employed in the extended plan of education suggested: and that there was nothing in the original institution and endowment, which necessarily

sarily excluded the teaching of any useful kind of learning, and he therefore approved of adding a German master, and a French master, and a master for teaching algebra and mathematics: but as it appeared there were a variety of schools for teaching writing and arithmetic, at a small expence, and that a greater proportion of prejudice might arise to them than of benefit to the town to have these taught free, he only approved of those three masters to be elected, as the master and usher have been.

An exception was taken to this report, that the donor had intended only one master and one usher; that as the estates were copyhold, and as part of the rents must be set apart for repairs and fines, the residue would not constitute unreasonable salaries for two men of learning, who were to derive no other benefit from the school than their salaries; that the utility of the French and German languages, in future must depend upon accident and political and commercial circumstances; and therefore it was not proper to be made a permanent part of an institution like the present. And if the master and usher were not entitled to the whole rents, their salaries ought to be augmented, rather than leaving them to the discretion of the committee; but specific directions should be given on that head.

The Lord Chancellor took the object of this information, to convert this old school into a commercial academy—that strictly the cause ought to be reheard, and the court ought to declare what is the charity, but in a charity case that might now be done. Upon the principle that the information praying wrong relief, the court will, as it ought, give such relief as will do justice to the defendant; and might therefore take so much liberty with the record, as now to examine and declare what is the charity, and proceed upon that.

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The question is, not what are the qualifications most suitable to the rising generation of the place where the charitable foundation subsists, but what are the qualifications intended. If upon the instruments of donation the charity intended was for the purpose of carrying on free-teaching, in what is called a free grammar-school, I am not aware, nor can I recollect from any case, what authority this court has to say the conversion of that institution, by filling a school intended for that mode of education, with scholars learning the German and French languages, mathematics, and any thing except Greek and Latin, is within the power of this court. The proposition is quite different, where the directions prayed are founded in a purpose to promote the direct object of the charity; and where boys are to go to this school, who are not to learn Greek and Latin, but are to have a particular part of the school set apart, and the funds applied for a different purpose from that intended by the donors, which may be very useful to the rising generation of Leeds, but cannot possibly be represented as useful to this charity. The difficulty is insuperable. It is more agreeable to principle to increase the emoluments of the master and usher, for carrying on the purpose of the institution, than to bring in masters to whom the object of it does not point.

Atty. v. Parker. Smart, Secor. 1 Ves. 43, 72, 413.

Upon what principle does the master set off the prejudice those other seminaries would sustain, against the benefit of the inhabitants of Leeds? If according to the plan, every boy to be brought to the school was to be taught the learned languages, and the circumstance that these other sciences were to be taught, would induce persons to send boys to the school to learn Greek and Latin also, that purpose might have a tendency to promote the object of the foundation. But if these plans are to be distinct, the institution will be singular; hazarding

hazarding the destruction of all utility whatsoever. This is a scheme to promote the benefit of the merchants of Leeds. To make this school, as a Greek and Latin school, useful, there must be, what the authors of the charity express, a learned man, capable by his life and doctrine of giving the most useful information.

His lordship then declared, upon the evidence, that the foundation was a free grammar-school, for teaching grammatically the learned languages, according to Dr. Johnson's definition, upon circumstances, without variation, in fact since the year 1553, as better interpreters of the nature of the charity than any criticism he could form, or construction upon the instruments. And he held it not competent to that court, as long as it could find any means of applying the charity-funds to the charity, as created by the founder, upon any general notion that any other application would be more beneficial to the inhabitants of the place, to change the nature of the charity. A case may arise in which the will cannot be obeyed, but then the fund will not go to the heir; upon the principle that an application is to be made, as *near as may be*; growing out of another principle, that you are to apply it to the object intended, if you can. It must appear by the master's report, that the court must despair of attaining that object; or the court cannot enter into the question, in what other way the fund is to be applied. Upon this declaration of the charity, it was referred to the master to review his report as to any plan; in which it would be open for him to consider what was proper and necessary, not for the benefit of the inhabitants of Leeds, but for the benefit of the charity—declared to be such upon the record.

Bp. Hereford v. Adams. 7 Ves. jun. 324.

SECTION V.

Of Incumbrances.

Or of any Estate or Interest therein, or any ways Charged or Incumbered by any Person whatsoever, or of any Charge or Incumbrance affecting the same.] Previous to, and up to the time of passing this statute, the courts of law and equity were accustomed to maintain not only devises of land, but of rent-charges, annuities, and other incumbrances, in favour of charities: the first case which shall be noticed took place in Easter term next before the date of the act, which is here preserved, in order to shew the difference of the doctrine which has been introduced in consequence of the statute. This was upon an ejectment brought in the court of Common Pleas, upon a question arising out of the will, dated in 1699, of *Nathaniel Hudson*, who devised real estates to his sister, and the heirs of her body; and for want of such issue, to his nephew in fee: and his moiety of other estates to his sister and her heirs; and in case his sister and nephew should both die, having no issue of their, or either of their bodies, he gave several legacies to charitable uses, payable as annuities for ever—remainder to such uses as his sister should appoint: which payments to charitable uses he directed should be paid after such decease of his sister and nephew, without issue, by such persons as should enjoy the said estates and moities; and gave the other moiety to his nephew in fee*.

Scrape v. Rhodes. C. B. 9 Geo. 2. Comyns, 542. Easter T. 1736.

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* A devise of an annuity and a sum of money to a person, and if he die without *heirs*, then to a charity:—as this would be void, if so given to Devise over of money is void. 2 P. Wms. 369.

In 1705 the sister conveyed the premises devised to her, to the use of herself for life; with remainders as to one moiety to Sarah for life—to trustees, &c.—to sons in tail—and then to her daughters, &c.—and as to the other moiety, to the nephew of *Hudson* in fee.

She died without issue: Sarah died, leaving issue two daughters: the nephew had two sons, one of whom died without issue, and the other entered, and made the demise to the plaintiff.

It was urged that if she took only an estate tail, this conveyance would be void; for the subsequent words in the will, in case she and the nephew "should both depart this life, leaving no issue of their bodies, or either of their bodies, then such charitable legacies shall be paid for ever," shewed the testator's intent, that she should have the moiety of the houses devised only to her and the heirs of her body.

On the other side it was insisted, that there was no devise of the lands over on her dying without issue, but only a devise of three legacies, which were to stand charged on the estate, in case she and the nephew should both die, leaving no issue; a contingency which had not then happened.

The court gave judgment for the defendant; that the lands themselves were not devised, but only yearly sums to be paid out of the lands. The intention therefore seemed to be, as far as could be collected from such obscure words, that she should have the estate in fee; but if she left no issue, and if the nephew left no issue, (who was heir-at-law to her if she left no issue) then the estate

Atty. v. Gill, 1726. to a common person, so shall it be also void, when given to a charity: the word *heirs* shall not be construed to signify *heirs of the body*, where the devisee over is not inheritable. Here the devisee died in the life-time of the testator, and this determination was made on a demurrer to an information against the executors to establish the charity.

estate should stand charged with those annuities, in the hands of any collateral heir.

Soon after passing the last statute of mortmain, we find the following determination on this subject:

A devise of land was charged with an annuity to a minister of a *Baptist* meeting-house. (Testatrix died before the last act.) The question was, whether this was a charity of such a nature as is proper for the court to countenance or establish? In aid of the arguments for the question, these cases were cited: *Da Costa* v. *D'Pays*, in 1743, where *Elias D'Pays*, a *Jew*, appropriated a sum of money for the establishment of an assembly for reading their holy and divine law for ever. It was held illegal, as against the propagation of the Christian establishment. *Atty.-Gen.* v. *Andrews*, in 1748, copyhold lands devised for benefit of *Quakers*, and established as a good charity. Sir *J. Strange* (for Lord Chancellor) said, these cases seem strong in support of this. The Baptists are persons the legislature have thought proper so far to countenance, as a denomination of Christians, as to extend the toleration to them, standing on the same foot as Quakers, another species of dissenters: if therefore the court has established it in case of a provision for Quakers, there is no reason why a difficulty should be made to give this kind of dissenters the benefit of that provision. In the Quakers' case, the court went a great way, not only countenancing it as a good charitable use, but supplying the want of a surrender to the use of the will. It is somewhat material that the mortmain act has made no distinction between one set of people and another. The minister was decreed to have the arrears, and the charity established for payment for the time to come, and his costs. 2 Vezey, 275. Atty. v. Cock.

A considerable time after this decision, an argument was raised upon a devise of annuities to church-wardens

for a particular, not a charitable use, although in some respects nearly connected therewith, and which was declared void, rather on account of the devisee's incapacity to take, than of the devise itself.

1767. Grosvenor v. Hallam. Amb. 643.

R. Goldsbury devised his real estates to be sold, and gave divers legacies out of the produce; also two annuities to church-wardens for repairing his family vault, and the rest to charitable uses.

Lord Camden, chancellor, declared, 1. The annuities void. They are given to church-wardens, who are not a corporation to take, and therefore are void at law; and being so, a court of equity will not appoint new trustees to set them up.

2. They are not blended with the charities, but are distinct sums directed to be applied for that particular use; and though the church-wardens could not take, yet the devise is good, and the heir-at-law is a trustee.

Next, it is material that the residuary legatees are not so of the land itself, but of the money after the land is sold; and therefore the heir-at-law was declared to be entitled.

1 Bro.Cha.Rep. 61. Wright v. Row. Also, Barrington v. Hereford. 1772, bef. Lord Apsley. And Atty.-General v. Coldham, 1773. Lord Apsley.

So likewise if money be devised *to be laid out in lands* to or in trust for any person, charged with an annual sum to a charity, the devisee will take absolutely; the charity is void: or where the devisee of lands be restrained from alienating, and if he do, then the lands to go to a charity; the legacy and devise, in either case, are void as to the charity, and will sink in favour of the specific devisee; and not go to the heir-at-law or residuary legatee.

8 Mod. 222. 1 Vezey, 320.

The cases cited in favour of the heir were, *Wright* v. *Horne*, *Durour* v. *Motteux*, *Grosvenor* v. *Hallam*, before Lord Camden, March 7, 1767; *Barrington* v. *Hereford*, before Lord Apsley, in which latter case the annuity being charged on a personal legacy, the master of the rolls

rolls gave it to the residuary legatee. But here the chancellor decreed in favour of the specific devisee, as arising out of his estate.

But very lately, where an *annuity* was expressly bequeathed in trust for a charity to educate poor boys in reading, writing, and arithmetic, charged on a real estate devised subject thereto, was held to be void under this statute: and a question was raised, whether it should go to the specific devisees of the estate, or to the devisees of the residue. It was decreed, that the testator having excepted it out of the residue, and could never have had it in contemplation that it should in any case go to the residuary devisees, it should sink for the benefit of the specific devisees, as part of the produce of the estate devised to them. 12 Ves. jun. 500. Baker v. Hall, 1806.

It has been determined, that if a man devise his land to trustees to be *turned into money*, and *that money laid out in a charity*, it is not good within this statute; for it is an interest *arising out* of land. So a devise of a *mortgage*, or of a *term of years* to a charity, is not good; for the words of the statute are, that the *lands shall not be conveyed or settled for any estate or interest whatsoever, or any ways charged or incumbered in trust, or for the benefit of any charitable use:* and by the third section, such *gifts of lands, or of any estate or interest therein, or of any incumbrance affecting the same, are declared void.* I have heard it questioned, that this is merely meant to confine a person from charging *his own* lands with a charitable legacy; but that a man may bequeath a mortgage made to him to secure a debt, to a charity: but it has been always held, that the devise of a mortgage passeth the lands so mortgaged, for the equity of redemption passeth to the mortgagee; thus all remedy is shut out from a charity, who could not foreclose, because it cannot take the right of foreclosure; and 2 Burn. Eccl. Law, 478. Atty. v. Meyrickе. Hall v Greycoat Hospital. Ante 130. Cro. Car. 37. Atk. 605. Bac. Abr. 83. God. O. L. 477.

therefore the bequest of any real security to a charity is in its nature void.

2 Vezey, 547.

The student will, however, examine attentively the following cases, with which I was formerly favoured in manuscript; but the first is more fully reported in 2 Vezey, 44.

Mortgages, &c. Atty.-Gen. v. Meyricke.

Edward Williams, the father of the testator after-named, having a mortgage in fee upon the lands of Oliver Jones, bequeathed the same to Edw. Williams his son, and appointed him executor of his will. Edw. Williams being the eldest son of his father Edw. Williams, and being entitled to this mortgage, both as heir and executor of his father, brought an ejectment against Oliver Jones for possession of the mortgaged premises, and recovered; and by an *habere facias possessionem*, had the possession thereof delivered to him.

Edw. Williams afterwards, on the 23d April, 1744, made his will, and amongst other things devised as follows: "I give, devise, leave, and bequeath all the "money in anywise due to me by mortgage, bonds, or "any other notes, specialty, or assumpsits on the estate "of Oliver Jones, whereof I am now possessed, by "*habere facias possessionem*; and also all my personal "estate of what nature soever, to Robert Meyricke, "and Thomas Humfreys; in trust, that after payment "of my debts, legacies, and funeral expences, they, or "the survivor or his heirs, shall fix on a place in the "parish of Gwyddelwem, for schooling and teaching "and clothing so many of the poor boys of the said "parish, as the interest of what money I am now pos-"sessed by virtue of my securities upon the estate late "of Oliver Jones, will be able to maintain; and I direct "that all the money before-mentioned due to me from "the estate of Oliver Jones, to be laid out by them at "interest, upon good and sufficient security, and that "the

" the interest thereof be employed in maintenance of the " said school for ever."

The testator afterwards died in possession of the mortgaged premises, without foreclosure.

This case came before the court upon an information brought by the attorney-general, for establishing this charity, and ordering the trustees to act in the trust.

The question was, whether, as is insisted by the next of kin to the testator, this devise to the charity is a good devise within the statute of 9 Geo. II.?

Master of the rolls.—First, I shall inquire what right or interest passed by the will on its natural construction, without relation to this act of parliament? Secondly, Whether it comes within the act on account of the right which passes or otherwise?

1. As to the first question; the testator being heir and also executor of his father, to whom the mortgage was made, the legal estate descended upon him, and also the equitable. The testator then having devised all the money due to him by the said mortgage, &c. upon the estate of Oliver Jones, on the part of the relator it is said, that mortgages being considered in this court as personal estate, and the money is only devised, that the heir of the testator has the legal estate of the mortgage descending upon him, and shall be only a trustee for Meyricke and Humfreys, for the use of the charity.

But this distinction between a devise of the land and of the money is without foundation. For if a man gives all his mortgages to A, all the interest the testator had in the mortgages passes, and the executor, if the mortgage was for years, and the heir, if in fee, would be trustees for A.—If this is the case on a general devise, it would be so when the words made use of are money on a mortgage.

This case was well compared to a devise of the rents and profits of land; by which words the land itself passes. So in Laundy and Laundy, Trin. 8 Geo. II. in B. R. by a devise of ground-rents, the land passed.—Further, the devise is to Meyricke and Humfreys, which must pass the legal inheritance, or if not the heir is a trustee. Therefore I am of opinion, that this devise would pass all the right and interest.

2. Whether the *mortmain* act has prohibited such devises? This depends on the reason of that law, and the construction of its several clauses. The court ought to put such a construction on this act, being a remedial law, as will most effectually repel the mischief, and advance the remedy; and therefore, if by any means the mischief intended to be prevented by the act may happen, the act ought to be construed to prevent it.

I am of opinion this devise comes both within the words, and also the plain intent of the act.

The intent was to prevent lands coming by any means into hands where they would be unalienable. Therefore the first prohibition is absolute as to real estates, but leaving men at liberty as to personal. The next circumscribes personal estate, and says, you shall not give money to be laid out in land. It goes further, money due on mortgage, affecting land, and the payment depending on the pleasure or ability of the mortgager; the act has therefore provided the third clause to take in the very case of mortgages; and if it is not intended for mortgages, I do not know what it is intended for; and says, you shall not give that which is or may be a charge on lands. Suppose a sum devised, directed to be laid out on mortgage of lands, this is within the very words of the 2d clause. Is there any difference between this and a mortgage in fee? I should think on the first clause, that mortgages are prohibited; but by the latter clause

clause I am sure they are, on which I found my opinion; which clause ought to have a liberal construction to prevent the mischief. For in the cases upon the 11th and 12th of Wm. III. against papists, it is observable, the court has made a liberal construction to prevent the mischief *.

The information was dismissed; but this being a new case, without costs on either side.

In a subsequent case on this subject, Lord-chancellor Hardwicke thus delivered his opinion on the construction of this act. I never was so clear in my life, on the words and intent of an act. The question is, whether a devise, in express words, of a *term for years* to a charity be good, without the act? I never will construe this act by a chicane, as the first statutes of *mortmain* were construed: I shall consider it only on the preamble and the words of the act. 21 Nov. 1752. Atty.-Gen. v. Greaves.

In the preamble, all the mischiefs are taken, though it ends only with *disherison of heirs*; but recites, that the practices are as common as advantages taken to impose upon persons languishing.

The like mischiefs were intended to be prevented by this as by the former statutes. For the tenures were in view then, being the only support of the kingdom. But carry it on farther, when trade and commerce is intended, and then the locking up lands further increased the inconvenience. Therefore it is too narrow a construction to say, the preventing the disherison of heirs was only

* On the authority of this decision, in a case in 1776, where there was a bequest of a general residue of personal estate to a charity, such as the executors should appoint, and great part of the personal estate consisting of mortgages, Lord Bathurst held that the bequest was void as to these mortgages, and that the next of kin should have them as undisposed of; but that the debts, &c. should be paid thereout, as being undisposed of: which last part was agreeable to a determination of Lord Hardwicke, in *Atty.-Gen. v. Tomkins.* Atty.-Gen v. Martin.

only intended, which appears from the restraint of money to be laid out in lands, which lock up so much of the property of the kingdom; and this was the known view of the legislature.

As to the words; the first clause is the prohibiting clause, the next is the annihilating clause. I agree, these clauses run together; but the last clause may explain the first, though not alter it. Question is, whether tenant for years is in the clauses, or to be confined to interest derived out of the donor's seisin of the inheritance. The authority cited to prove, that if the testator be possessed of a term for years, he may devise, is, that in the statute of wills the word *seized*, as in the case of Owen Buckingham, extends only to inheritance: (23d Car. II. of frauds.)

That tenements are only construed to mean real interest. But the reason is, because confined by the subsequent words deviseable; but the statute of wills or custom, and term for years, are not deviseable by the statute of wills, or custom of Kent; as in these words in Owen Buckingham's case, *Potestne legare cattalla velut terra.* They argued upon this act, that any estate or interest in the devise shall not devise his own land, nor any estate or interest whatsoever. For as one can devise a term for years, yet statute of frauds forbids, unless in the terms required by that statute. But compare the words, "money to be laid out in land," in the first clause, with the words of the annulling clause, which annuls all gifts or grants of interest out of lands or tenements, and which were intended to be correspondent with the first clause. There is the same reason to say, that the words "nor any sum or sums of money to be laid out," relates to laying out in lands his own personal estate in possession, and not his personal estate in others hands.

Can

Can he give his personal estate to be laid out in terms for years? Clearly not, for it would be absurd.

The words in the third clause, "interest out of lands," clearly intend this case.

The arguments upon the old statutes of *mortmain* are the strongest reasons against construing this act as they were construed, and which shew the wisdom of this act.

The foundation and view of common recoveries, we read in the 2d Inst. were to avoid the *mortmain* act.

This act is penned so, as to take in the provision of all the statutes of *mortmain*.

The following is a very late decision on the principles already mentioned.

Hutchinson possessed of real estate, and also a large personal estate out upon mortgage; devised 7000l. to trustees after the death of his wife, to purchase lands in *Ireland*, the rents and profits to be distributed among his *poor relations* there, and in default of them, to *poor persons* in Antrim. His widow proved the will, and afterwards by her will reciting his, and that his personal estate was out upon mortgage in Norfolk, she ordered her real estate to be sold, and 7000l. to be paid to the uses declared in her husband's will. 1 Bro. Cha. Rep. 271.

Lord Loughborough, one of the lords-commissioners, said, The bequest to the charity is good, *being to a charity in Ireland*, if it was not made otherwise by the circumstance of the money being upon mortgage on an estate *here*, which could not be liable to the devise to a charity; but it is too late to take that objection on the will of the wife, she admitting by the devise to the *same uses*, that she had personal estate of the testator; she is therefore paying a debt, not giving money that is upon mortgage, but only admitting that she had 7000l. personal estate from him; which, as she was executrix and residuary legatee

legatee, is admitting a debt to the estate. Although the court will not marshal assets for a charity, yet it will make the legatees go upon the mortgage.—The charitable legacy was directed to be paid.

It is just the same as to the devise of a *rent-charge* on lands; this is to secure a sum lent, or due and owing, for which such *real security* has been given:—It is an interest arising out of lands, and an incumbrance affecting lands, and it is also a real security, giving such real remedy by distress and re-entry on non-payment, and, in many such grants, a power of actual sale to recover the principle and arrears, which no one can take who is not inheritable; and therefore a charity is precluded. And if the heir-at-law, or executors, made no objection to the devise, and transferred their claim to the charity, which thereby came into the annual receipt of the payments reserved (or in the former case, of the interest arising upon the mortgage) and the other annuitants, were desirous of selling; although a general court of the governors of the charity should authorise their treasurer, or the trustee to whom the rent-charge was devised, to join in such sale (a power which it is very doubtful whether they are able to delegate under the idea of a conversion or misemployment, or the altering the terms of the donor's gift), yet they could not make out a legal title to a purchaser, so as to indemnify him against the future claims either of the heir-at-law, or of any future visitor to reform the charity: and the very words of their conveyance would clash with the strict prohibition in the statute, as the premises to be conveyed could bear no other description than a charge or incumbrance affecting lands, or an estate or interest therein.

See 1 P. Wms. 222. 43 Eliz.

But an annuity is very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burden imposed upon and issuing out of lands, whereas

2 Bl. Com. 40. Co. Lit. 144. 2.

whereas an annuity is a yearly sum chargeable only upon the person of the grantor. Therefore if a man, by deed or bond, grant to another 20l. per annum, without expressing out of what lands it shall issue, no lands at all shall be charged therewith; and yet a man may have a real estate in it, though his security is merely personal; the remedy in case of non-payment is to sue upon the bond, which in case of judgment either against the obligor or his heirs, extends to his lands, and this renders it a real security affecting lands: but a mere annuity may be granted or bequeathed to a charity, and is not within the statutes of mortmain, and the executors will be bound to provide for it out of the personal assets received: but in case there should not be sufficient assets, after payment of the debts, to discharge the other legacies, and invest a capital sufficient to produce the annuity, all the legatees, with the charity also, must proportionably abate; for though charities are preferred by the civil law, yet they ought to abate, for they are but legatees.

1 P.Wms. 423. Masters v. Masters.

Courts of equity are bound to set limits to equitable demands, and to proceed by analogy to the practice of courts of law, where payments and satisfaction of legacies and of bonds, and even judgments are presumed from length of time. If parties are conusant of their rights, and lie bye for a great length of time, and suffer other persons to act as if those rights did not exist, they cannot be relieved. Though it may be illegal to give money, secured by land, to a charity by will, it may be legally given in the life-time of the donor; therefore it is not absolutely illegal. The determinations upon the mortmain act, with respect to mortgages, are a great refinement, and great inconvenience in entertaining a bill against a charity which has subsisted many years undisturbed; it is material in such cases to enquire, whether the next of kin,

4 Bro. 214. 1793. Pickering v. El. Stamford. Rolls.

4 Vez. jun. 21. 1798. Rolls. White v. Evans. 272.

kin, or heir-at-law, may not have relinquished their claim.

2 Vez. jun. 581. 3 Ibid. 332, 492. 2 Vez. 44. Pickering v. Lord Stamford. Atty. v. Meyrick.

But there can be no doubt that a charitable legacy, secured by mortgage, is void by the mortmain act.

So likewise a legacy in remainder, subject to a mortgage. Mr. J. Brown bequeathed a sum to be paid to the trustees of the chapel in Essex-street, whereof the Rev. Theophilus Lindsey and Dr. Disney were ministers, to be applied towards the discharge of a mortgage on the said chapel. And by a codicil he gave, after the decease of his wife, a legacy to the treasurers of the new academical institution among protestant dissenters. During the testator's life-time the mortgage was paid off, and during the life-time of his wife the academical institution ceased.

4 Vez. jun. 418. 1799. Corbyn v. French.

Master of the rolls, *Arden*.—It was insisted that this being in its nature a charitable use, the bequest to be applied in redemption of the mortgage is within the statute of mortmain, commonly so called, but very improperly; for it does not prevent the alienation of lands in mortmain; nor was that the object of the act: it has nothing to do with that. The object was to prevent devises of land, or any interest in land, or bequests of money to be laid out in any such interest for any charitable use whatsoever.

It was likewise insisted, that if this legacy is not void, inasmuch as at the death of the testator the mortgage was paid off, and therefore that object could not now be attained, it is not applicable to any other purpose for the benefit of that society; and as the object pointed out by the will could not arise, the fund will belong to the residuary legatees: both which points the court favoured.

It was also insisted, and with success, that though the constitution

construction of the statute has been extremely rigorous, and many determinations upon it have been thought to carry it even beyond what the legislature had in contemplation at the time; as for instance, when part of a residue given to a charity consists of mortgages or other securities upon land, though it was held that it was not an immediate gift of an interest in land, being only what should remain after the debts were paid, it was melted into money; it was determined, that as to so much of the residue as consisted of securities upon land, the charity could not take any part of the residue so constituted; —yet there have been repeated determinations, that it is competent to a testator, though not to give directly any interest in land to a charitable use, to leave a sum of money for the purpose of meliorating, as it is called, any land, or for beautifying, sustaining, or repairing buildings already vested in trustees for charitable uses; and no doubt is now entertained upon it, and many cases have been determined upon the distinction, whether it is clear the testator meant the money to be applied in erecting, &c. buildings upon lands already vested in trustees for charitable uses, or had any object of having fresh land purchased for that purpose.

2 Vez. 272, 582. 3 Vez. 332, 492. Amb. 635. 2 Vez. 44. 4 Vez. jun. 430. Blandford v. Thackrell. 2 Vez. jun. 238.

It is said, this case is analogous to those cases in which the court has established in favour of a charity or disposition, not of an interest in land, or of a sum of money bequeathed for the purpose of any interest in land, but for the purpose of meliorating land already vested in trustees for charitable uses. I am of opinion that cannot be considered as the true construction of this gift. The words of the statute, which go far beyond the title, are very express. It is called an act to restrain the dispositions of land, whereby the same become unalienable. It then recites, that gifts or alienations of lands, &c. in mortmain are restrained by Magna Charta, and other laws, as against the common

common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations, or dispositions to uses called charitable uses (not dispositions in mortmain); and the first clause enacts, that no manors, &c. shall be conveyed, &c. to any persons, bodies politic or corporate (that is the only case in which it could be in mortmain) &c. The third clause enacts, that all gifts, &c. or of any charge or incumbrance affecting lands, &c. made in any other manner, shall be void.

Upon the third clause this question arises, whether this is or is not a legacy to be applied in the purchase of an interest in land, or a charge or incumbrance affecting the same. I am of opinion, that it is directly in words given for that purpose. Without all question, unless the other argument is resorted to, it is a direction to apply this money in the purchase of that interest then affecting those premises. But it is said, those premises were already appropriated to the same use for which this mortgage was to be redeemed; and it is further insisted, that if the testator had been himself the mortgagee, and had directly given the mortgage by his will to these trustees, having the equity of redemption, it is something like beautifying, sustaining, and repairing buildings; money given to be laid out upon land already vested in trustees for a charitable use: but I deny that. The land was never given to that purpose. They had all the estate but this mortgage interest; and the purpose was to give those trustees who had the estate subject to this interest, which is in other persons, a larger and more extensive interest than they had before. I am of opinion it is within the statute. It is nothing but a sum of money given for the purpose of procuring first, and then conveying to the trustees this farther, greater, and more extensive interest than they had before. I should be sorry to refine upon the

the statute, or to be more rigorous in the construction than former decisions warrant; not that I wish to defeat the statute, but I wish fairly to construe it.

The court has gone so far as to hold, that a sum of money secured upon turnpike-tolls is an interest in land within the act. This is not like the case of a building. It is very unfortunate that the testator, in such a case, should have taken this method of giving it; for he might have done it in a more direct way: and I am aware that all these refinements upon the statute are not using it for the purpose for which it was intended. Tolls.

If a man devises his lands to be sold, and directs the money to be applied to a charitable use, the statute says it is void. It is said, that if the trustee for a charity has any interest in land, the increasing that interest, or applying money by will to make it good, is not an interest *in* land within the statute. I put the case of the trustee having contracted for the purchase of an estate, and money being left to enable him to compleat that purchase; the counsel for the charity could not say that would not be within the statute. Suppose a part of the money was paid and part not; if the whole could not be applied no part could. Where is the difference? Till the mortgage was paid off, the trustees had not that purchase. I am therefore of opinion, that this sum of money bequeathed to redeem the mortgage upon this chapel is void by the statute.

If I am right upon that point, perhaps the other consideration is immaterial; but as the point was made, I will say afterwards upon it, for the purpose of having Attorney v. Bishop of Oxford, which has been mistaken, perfectly understood.

It is said, supposing this legacy is not void by the statute, it is not so confined to the purpose of paying off the mortgage as that in case it was paid off without the

knowledge of the testator I may not infer an intention under which it may be applied to other beneficial purposes for this society. I confess the inclination of my opinion is otherwise. The true question is, can any intention be collected beyond that of securing to them the enjoyment of this building; any intention that, after having provided for that object, if the whole was not necessary for that, the surplus should be applied for any other beneficial purpose in favour of the society. I am of opinion no such intention can be collected. I will not say, that, if this legacy was not void by the statute, it might not be applied to sustaining and repairing that building; but that it can be applied to no other purpose, I deny, if *Attorney* v. *Bishop of Oxford* is right; in which case the decree was decisive, that the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. I will not say it could not have been applied for repairing or sustaining the chapel; and I doubt whether Lord Kenyon said so: but beyond that purpose, or after satisfying it, this is decisive, that it could be applied to no other purpose; for if it was applicable to any other general purpose, or any other purpose for the benefit of that parish, except of the nature pointed out, that decree could not have been justified.

If, therefore, this legacy was not void upon the statute, I should pause upon the question, whether I could apply it to any other purpose. I see the testator intended it to provide for these persons a place of worship. I see no other intention, and I think I could not apply it to increase the salary of the ministers, or for any other purpose. In looking over these cases, understanding that the question, how far a legacy given to a charitable purpose may be applied to any other purpose than that specified, is now depending before the Lord-chancellor in

Attorney

Attorney v. *Andrew*. I find that in *Moggridge* v. *Thackwell*, Lord *Thurlow* makes this observation. 3 Ves. jun. 633. 1 Ves. jun. 469. Postea.

" Baxter's case was very strong; and perhaps would not now be followed. The legacy was deemed to be void, because for forbidden uses; and yet the court thought, as it was declared to be for charity, it should be given to charities to be declared by the court. I do not mean to state that as an authority; for it is very hard, indeed, that the court should give it to other charities because those which were mentioned could not take." I confess I very much agree with this doctrine.

Declare this legacy of 500l. void under the statute of 9 Geo. II.

The decree in the *Attorney-general* v. *Baxter*, declaring the legacies for the ejected ministers void, and that the legacy should be applied to the maintenance of a chapel in Chelsea College, appears to have been reversed in the *Attorney-general* v. *Hughes*, and the validity of the disposition established: the money appearing to have been ordered to be distributed according to the directions of the will. This subject was much discussed in the case of *De Garcin* v. *Lawson*. 1 Vern, 248. 2 Vern, 105. 31 July, 1798.

Ann Fairfax, by her will, made in 1784, after giving several charitable and other legacies, gave the residue of her personal estate to her executors upon trust, to apply the same to such uses as she should by any codicil appoint: and subject thereto to the petitioner and another person, share and share alike.

By a codicil made in 1793, the testatrix gave legacies to several Roman Catholic establishments in foreign countries and in this kingdom. These legacies were considered as being void; those to foreign establishments being contrary to the policy of this country, and some of them having ceased to exist; the others being either

given to individuals, in characters with respect to which they could not claim, or for an illegal establishment.

The question arose as to the void legacies between the crown claiming a right to appoint, the plaintiff and another person claiming under the residuary clause, and the next of kin contending that the residuary disposition was specific and limited, and therefore what was taken out of the specific residue for purposes that failed would belong to them. In opposition to the claim of the crown, it was insisted by the Solicitor-general, Mr. *Owen*, and Mr. *Hall*, that such a claim upon the principle, that the property being given for an improper purpose was forfeited, can rest only upon the statute 1 Edw.VI. c. 14.; but that statute gave to the crown only dispositions to superstitious uses then subsisting, and had nothing in it prospective. Therefore superstitious uses since limited are merely void. The opinion that prevailed in some cases, particularly *Baxter's* case, that the crown may appoint was disapproved by Lord *Thurlow*, in *Moggridge* v. *Thackwell*, and the decision in the *Attorney-general* v. *Whorwood*, shews, that where the use is clearly expressed, if it cannot take effect, it is wholly void, and no other use can be substituted. The true case where the disposition is in the crown is, where the charitable purpose is not so clearly expressed as to shew what was intended: as in the *Attorney-general* v. *Siderfen*, *Attorney-general* v. *Hickman*, *Attorney-general* v. *Herrick*, and *White* v. *White*. That principle has been followed in the *Attorney-general* v. *Whitchurch*, and the other doctrine of *Cy pres*.

1 Ves. jun. 469.
1 Ves. 534.
1 Vern. 224.
2 Eq. Ca. Abr. 193.
Amb. 712.
1 Bro. C. C. 12.
3 Ves. jun. 141.

The *Attorney-general* and Mr. *Campbell* relied on the *King* v. *Lady Portington*, the first decree in *Baxter's Case*, and *Da Costa* v. *De Pas*, as affording a principle in support of the right of the crown beyond that of *Cy pres*.

1 Salk. 162.
1 Vern. 248.
Amb. 228.

The

The Lord-chancellor said, he had always thought that where the disposition was to a superstitious use the crown appointed: but that he should consider in a few days.

During the argument it appeared very doubtful, whether there would be any fund for the charitable legacies, a great part of the personal estate being secured upon mortgage, and the rest not being sufficient for the discharge of the debts, nor equal to the legacies to which there was no objection. It was also suggested, that some of the legacies under the codicil, claimed by the residuary legatees as being void, had been paid with their consent by the executors. It was also observed, that the disposition in *Baxter's* case was established by the reversal of the first decree; the toleration act having passed in the interval, and there being nothing illegal in the object; which was not to establish any thing superstitious, but merely to provide for a number of persons in distress; and the application was to be personally by Mr. *Baxter* himself. The right of the crown, therefore, certainly appears not to be affected by the final decision of that case. The exercise of that right by the first decree, and in the case of *De Costa* v. *De Pas*, cannot well rest upon the principle of *Cy pres*. Supposing forfeiture to be the principle, the right of the crown, if it exists independent of the statute of Edward the Sixth, may perhaps have its source in the early statutes of mortmain, under which a forfeiture accrues to the lord, and ultimately to the king. It is remarkable that the statutes of 23 Hen. VIII. c. 10. and 9 Geo. II. c. 36. contain no clause of that nature, but simply declare the disposition void.

Amb. 228.

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20l. per annum, and any residue in charitable uses at their discretion. The heir-at-law claimed the real, and the next of kin the personal estate.

The master of the rolls, Sir Wm. Grant, held the devise void as to the real estate, and as to the mortgage. It was insisted, that the purpose to build a chapel upon ground already in mortmain is legal; though to purchase ground for the purpose of building a chapel is not legal.

The *Attorney-general* v. *Bowles* was referred to as an authority, &c. but that case appeared to have been overruled by a great number of subsequent decisions. Upon the principle established by the case itself, it seems a little extraordinary, that a testator having made no reference whatsoever to the case of land being already in mortmain, the court should suppose an intention that he has not in the most remote degree pointed to. But Lord *Hardwicke*, in favour of a charity, held that such an intention might be presumed.

Amb. 614. Amb. 731. The first case, in which the authority was impeached, is *Attorney* v. *Tyndal*, before Lord *Henley*. In a subsequent case, *Attorney* v. *Hutchinson*, Lord *Bathurst* takes Lord *Henley* to have there decidedly overruled the other case. In argument he certainly did overrule it, for he disapproved of the ground upon which that was decided; but the case immediately before him did not call for that decision, for it was not a case of the same kind. In that case the direction was expressly to purchase, and there was no option. But all the reasoning of Lord *Henley* went in direct contradiction to the former case. He held that the statute had two objects: 1. That you shall not give land for the benefit of a charity. 2. That you shall not realise for the benefit of a charity, that the mischief is the same; for if that precedent was to prevail, a piece of ground not worth 50l. might be made worth

worth 2000l. which, undoubtedly, is putting it in mortmain.

But a case directly in point occurred before Lord Northington in 1764, *Pelham* v. *Anderson*; for there 2000l. was given to build or erect an hospital, that was determined by him to be void. That case did directly overrule *Attorney* v. *Bowles*, the purpose being precisely the same. Then came the case of *Attorney* v. *Hutchinson*, to which I have before alluded, in 1775, where the bequest was according to the report in *Ambler*, for the purpose of erecting, and according to a note in *Brown*, for erecting and building a free-school. A strong circumstance was, that there was in the parish a piece of ground in mortmain upon which a school had formerly been erected; and it was contended, that the fact was in the testator's contemplation; and the intention was to re-erect the school upon that foundation; but Lord *Bathurst* thought, that as the testator had not himself pointed to that intention, it was not to be presumed by the court; therefore it was to be taken as a mere bequest for the purpose of erecting or building a school; and it had been determined in *Pelham* and *Anderson*, and the other cases, that such a bequest was void. 1 Bro. C. C. 444, note.

Then the case of *Foy* v. *Foy*, at the rolls, 1785, occurred, which went much further than any of these cases. There the legacy was given towards the erection and endowment of an hospital. Lord Hardwicke, in *Vaughan* and *Farrer*, and *Gastril* or *Cantwell* and *Baker*, held, that to erect does not necessarily imply to build, much less a purchase of ground for building. He held it might mean merely an endowment; but Lord Kenyon, in *Foy* and *Foy*, held, that if there was no hospital already existing that would be void. 3 Brown, C. C. 591. 2 Vez. 182.

Then came *Attorney* v. *Nash*, in which the words "erect and build" occurred. The former, undoubtedly, is not 3 Bro. C. C. 588.

so strong as the other, from what Lord *Hardwicke* had held, it might mean an endowment. Therefore, in that case, the word *build* was the operative word. But Lord *Thurlow* held the bequest altogether void, and allowed the demurrer.

In this case the alternative is to build or purchase. It is admitted a bequest to purchase would be void; and it is determined by all those cases, that a bequest for the purpose of building a chapel is equally void. That bequest, therefore, falls to the ground. The next question arises upon the direction, that if any overplus remains after the purchasing and building the chapel, it shall go towards the support of a faithful gospel minister, not exceeding 20l. a year. It is contended by the next of kin, that this is a bequest dependent upon the former; and that failing, this must likewise fail upon the authority of *Attorney* v. *Goulding*. The late master of the rolls seemed to doubt a little the doctrine of that case, in *Attorney* v. *Earl of Winchilsea*, but afterwards in *Attorney* v. *Boultbee* he approved of that doctrine, and acted upon it. It is then contended, that this is not insisted upon the other purpose; but it is for the support of a minister generally, not at that chapel. I am clearly of opinion she must have meant a minister in that chapel which she meant to be purchased. It would be quite absurd to suppose she intended no provision for the minister of her own chapel; but that a provision should be made for the minister of some other chapel, to be built by a stranger. Therefore, upon the authority of *Attorney* v. *Goulding*, and *Attorney* v. *Boultbee*, that bequest must fail, as the chapel is not to have existence.

2 Bro. C. C. 428.

3 Bro. C. C. 379.

Ibid, 373.

Upon these two parts of the case I have had very little difficulty; but I have been a good deal embarrassed as to the ultimate bequest of the residue to be applied by the executors in general to charitable purposes. Stand-

ing by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper, is a good bequest; supposing it legal to do as the testatrix had desired, and a residue had been left, after those purposes were answered, there would have been a good bequest of it; and therefore the question is, whether that ulterior bequest is to fail because the prior bequest cannot take effect. If it could be reduced to any certainty how much would have been employed by the executors for the other purposes, the residue ought to be employed under this last direction, viz. for charitable purposes generally. I have considered whether that can be ascertained by a reference to the master, to see how much would have been sufficient for this chapel; but upon consideration, it is quite impossible to give any direction that would not be vague and indefinite to a degree almost ridiculous; an enquiry, what they might have employed for building a chapel, without knowing what kind of chapel: the testatrix having given no ground to ascertain what kind of chapel: no locality. It is utterly impossible to frame any direction that would enable the master to form any idea upon it. If she had even pointed out any particular place, that might have furnished some ground of enquiry as to what size would be sufficient for the congregation to be expected there; but this is so entirely indefinite, that it is quite uncertain what the residue would have been, and therefore it is void for that *uncertainty*. She had no view to any residue but a residue to be constituted by actually building a chapel. She contemplated no residue but with reference to that. It is impossible to ascertain it in the only manner in which she meant it to be ascertained. It is impossible for the court to apply it, therefore the whole of this disposition is void.—Decreed the real estate to the heir-at-law, and the personal to the next of kin. See Post. *Attorney* v. *Davies*.

10 Ves. jun. 41. Finch v. Squire. 1804. A bequest of residue, secured upon poor-rates and county-rates, in remainder over to the treasurers for the society for promoting christian knowledge. The question was, whether this savoured of the realty so as to be within the statute; and it was contended, that the rates as Rates, Tolls, &c. received become security for the sums advanced as a personal pledge, and not to be considered a security upon land. According to the nature of the rates the assessments are made on visible property. The duty does not issue out of land, though the amount is ascertained with reference to the property real and personal: it is not like rent, merely because the remedy is the same.

On the other side it was urged, that this is not personal security by any one, but is merely a mortgage of the rates. No person would be liable upon the security; the only resort is to the rates themselves. They are levied under 43 Eliz. c. 2. upon all lands, &c. If there is real property, the circumstance that they are to come out of personal also is not sufficient, as in *Knap* v. *Williams*, no land was there resorted to. The mortgage did not include the toll-houses, and this is in nature of a rent issuing out of land. The remedy is by distress, the mode of recovering all rent charges. It cannot be said the poor rates do not affect land, the course is to value the land, and the party is rated upon that, and not upon personal ability.

The master of the rolls said, there is no solid distinction between money borrowed upon such a security as this, and money borrowed upon turnpike tolls. It is difficult to shew that a charity, by taking money borrowed upon the latter security, takes any interest in land. Those tolls are duties imposed by parliament upon passengers, in respect of their passing along the road. The right to collect those tolls gives no direct interest in the land itself, though an interest in duties arising in consequence of

of a passage along or through the land. The poor-rates are made payable by those who are occupiers of lands, &c. If a man is not an occupier of lands he pays nothing, unless he has other property; but if he has only land, he pays in respect of that. A very nice distinction was taken by the plaintiffs, that the public make him contribute as having the land, not on account of the use of the land. That distinction is not very perceptible. In the one case the public call for the duty on account of the passage along the land, that it may be laid out for the purpose of public advantage, the repair of roads, and facilitating communication; in the other case, they actually burden the lands by burthening the occupier with the duty, for other public purposes of convenience and advantage. It is true they are not raised out of the land *only*: but by far the greatest part is raised out of the *land*; for the land pays so much rent, in consequence of the occupier being liable to the poor-rates, otherwise the landlord would have more rent; so all that is paid in respect of the land is got from the land, as much as rent arises out of the land itself. It is more properly to be said to arise out of the land, because it is in respect of the occupation, than the tolls for the mere privilege of passing. As to that part of the poor-rates that is raised out of the personal property, it cannot be distinguished, the security cannot be divided and apportioned; they are so blended that it is impossible to distinguish them. If the consequence of their holding this security would be that something real would go to the charity, it must fail together; that is the necessary consequence; for it must be the security as it stands: that is, such a security as charges the poor-rates in the mode and manner in which they are collected. Therefore these securities cannot pass to the charity.

In like manner the tolls collected at any bridge, or market,

market, or through any town, are generally secured by contract or mortgage by the trustees; and also shares of any canal which are declared by the statute establishing the canal to be personal estate, and New River shares, which are real estate, are all within the act of mortmortmain, and are not therefore to be bequeathed to charitable uses; for like rents of premises they are issuing out of the realty. It may be further considered, that securities on *turnpike-tolls*, not including the toll-houses and gates, are within the prohibition of this statute; because the mortgagee would have a right to come into court for an account, and for a receiver to be appointed. He would have a right, by the aid of this court, to have the tolls specifically applied to this mortgage. Consider what the point of law is from the nature of the interest. It is not at all within the mischief, but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the act, these tolls granted in perpetuity are certainly a hereditament; it is in its nature an interest affecting land. He might bring an assize of these tolls.

2 Dickens, 545.

4 Vez. jun. 430. 1798. Knapp v. Williams.

There is another species of toll which gives no right at all in the land. That is toll through.

4 Vez. jun. 542, 551. Howse v. Chapman, 1799.

A bequest of residuary estate, which consisted of mortgages, turnpike-bonds, and other personal estate, was bequeathed for the improvement of a town, and was held to be void as a charitable bequest, and within the case of *Attorney* v. *Winchilsea*; with regard to the mortgages and turnpike-bonds, which did not pass thereby, but being undisposed of by the will, belonged to the next of kin; and a distinction was directed as to what particulars of the personal estate, specifically bequeathed for this purpose, were given, and passed by the bequest from such as did not pass thereby, and to be paid to the town-clerk accordingly.

SECTION

SECTION VI.

Of Personal Estate to be invested in Lands, &c.

Nor any Money, Goods, Chattels, Stocks in the Public Funds, or any other Personal Estate, to be laid out in Lands, &c.] The principal part of this restriction applies to the bequest of stock in the public funds, to be invested in the purchase of lands, or any other thing savouring of real estate for a charity. This was expressly meant to reach a case where a gift for a charity was intended; but an appropriate purchase of land had not then offered, or perhaps been fully completed. Such gifts must be bestowed, and irrevocably transferred in the donor's life-time, at least six months previous to his death, and be made to take effect in possession for the use intended, immediately upon the transfer—otherwise they are void, and may be recovered by the next of kin.

But although these are prohibited by the statute to be laid out, or disposed of in the purchase of lands, &c. for charitable uses; yet money, stock, plate, pictures*, &c. given generally is not forbidden: so also the residue of a personal estate hath been decreed not to be within the act; 2 Burn. Eccl. 478.

* General Guise bequeathed his pictures, &c. to Christ-church College, directing that they should not be sold, *being a good collection.*—In his life time he parted with some of them, and he acquired above an hundred more. Decreed that they all passed.—See *All Souls* v. *Cadrington*; 1 *Williams*, 597; and *Gayer* v. *Gayer*. 1767. Christ-Church College v. Barrow. Amb. 641.

The late Sir Robert Rich, Bart. bequeathed by will several views of his seat at Waverley Abbey to the City of London Lying-in Hospital, whereof he was president.—Held to be a good legacy, pictures being personal estate.

act; and if money be given to be laid out in "*lands or otherwise*" to a charitable use, it has been determined, that such devise is good, by reason of the words, *or otherwise*; as in the case of *Soresby* and *Hollins*, August 6, 1740; which being a decision upon the express merits of the late act, I shall beg leave to insert it at length, especially as it contains Lord Chancellor Hardwicke's exposition of the statute, in the making of which he seems to have been concerned.

Soresby v. Hollins.

John Naylor, in 1738, made his will in these words: "I will and desire that my executors within twelve "months after my decease, *do settle and secure by pur-* "*chase of lands of inheritance, or otherwise* as they shall "be advised, *out* of my *personal estate*, one *annuity*, or "yearly payment of 50l. to be paid yearly, and distri- "buted for ever by my executors, their *heirs and assigns*, "among the *poor and indigent people* of Leeke, in Co. "Stafford, in such manner as they shall think fit.—And "my will *also is*, that my executors do *settle and secure* "one other annuity of 5l. to be paid yearly to the "vicar of Leeke for the time being, for ever, for preach- "ing an annual sermon on every 12th day of October." And the testator devised the residue of his personal estate, to be equally divided between his sisters, Mrs. Soresby, and Mrs. Hollins.

Lord Chancellor Hardwicke said, the only question in this case is, whether the devise of the two annuities of 50l. and 5l. to charitable uses is void by the late statute of *mortmain*?

It is insisted upon by the plaintiffs, the residuary legatees, that it is void; because the direction of the devise is, to settle and secure the annuity by a trust of lands of inheritance: and though the words, *or otherwise*, are added, they will not vary the case; for Mr. Naylor's intention was, to give the annuity out of lands

of

of inheritance. But I am of opinion upon this act of parliament, that this bequest was not void, and that there is no authority to construe it void, if by law it can possibly be made good. The act of parliament is not at all aimed against perpetual charities, merely as such, or to prevent the establishment or creation of them; but is designed against the cases of perpetual charities in lands, and (as the title imports) to restrain the disposition of lands, whereby the same become unalienable. The whole recital, and enacting part of the statute, take notice only of the unalienable disposal of land, whereby heirs are disinherited; and therefore the alienation or conveyance of lands to such purposes are prohibited. And though there is a clause to prohibit money being laid out in lands, to such purposes as would make them unalienable; yet there is no restriction whatsoever upon any one, from leaving a sum of money by will, or any other personal estate to charitable uses, provided it be to be continued as a personalty; and the executors or trustees are not obliged, or under a necessity of laying it out in land, by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will, fall within the restraint and prohibition of the statute. And in the first words they do fall within them; for the testator directs, that his executors shall *settle and assure by purchase of lands of inheritance*; and if the testator had rested upon such first words, the devise had been clearly void. But then he goes on, in the disjunctive, *or otherwise as my executors shall be advised.* And if a devise in a will is in the disjunctive, and leaves to the executor two methods to do a particular thing by, the one lawful, the other prohibited by law; can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for if one bequest is lawful, that shall

shall be pursued and take effect.—It hath been further argued against the devise, that the words *(for ever)* shew, the annuities must arise out of some real estate, which only is capable of supplying them for ever: For personal funds are too perishable and transitory in their nature, to answer such everlasting annuities: And suppose a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity; it may so happen that the company may be quite dissolved, or that stock may fall, or interest be so reduced that half the annuity may not be produced. But these objections may be over-ruled. For if the company should be dissolved, the principal stock may be taken out, and vested in some other company. And there may be annuities that may probably continue for ever, and yet not be payable out of land. I will mention an instance of one, which has lasted a century and half, and may exist perpetually; which is Sir Thomas White's charity, being a disposition of money to be employed by continual rotation, in loans to poor tradesmen, of several sums to be lent for a settled number of years, and then to be repaid. And any man may at this day give, by will, a perpetual charity in this manner. But if a man by will secures such loans by lands or purchase of lands; such devise shall be void, and contrary to the late statute of *mortmain*. If this case had been to be considered by the court, before the act, it would, as the safest method to secure the charity for ever, have recommended and directed a purchase of lands; but when this court is precluded from doing it in this manner, if it can be obtained in any other, there is no reason to say the devise is void. It is said too, that the words *heirs and assigns* import a purchase in land, or some real thing; for no personal thing can descend to *heirs*: and if the money is to be invested in a personal security, it will not go to the heirs,

heirs, but to the executors; and so the intention of the testator will not be pursued. I will suppose, an obligor binds himself, his heirs, executors, and administrators, in a sum of money to a papist, who obtains judgment on the bond, and takes out an *elegit*; in this case I think it has been held at the assizes, or at least it might very well have been so held, that the papist cannot maintain an ejectment; and yet the bond is good to bind the person of the obligor and his personal representatives, but not to charge his land, or his heirs who represent him in his landed capacity. And this comes up to the present case, which may secure the charity in a double sense, either upon land or personalty, if the law would allow both; and if the law prohibits one only, it certainly allows the other. And I am of opinion upon the whole, that there is nothing that makes this bequest void in every part; but that it is good in that way which the law does not forbid. But I would not have it questioned, if a man should by his will direct a sum of money to be laid out in land, or upon rent-charge to be secured upon land for any charity, and in mean time (till it can be laid out) to be invested in government securities, for the benefit of the charity, but that *that bequest* will be void; because the final end and intention of such testator was, to dispose of his money in land, and the investiture of it in government and personal securities was but to secure it till a proper purchase of land or rent-charge offered. As to the annuity of 5l. there are fewer objections to *that* than to the other; for there is no direction at all for any money or personal estate to be laid out in land; for the executors are only willed to *secure and settle* 5l. *a year*, for the purpose there mentioned, and it must be secured upon a personal fund, consistent with the will and intention of the testator, and

not contradictory to the words of the act of parliament. And as it is often said in old books, that "I was by at "the making of the act of parliament, and the meaning "and intention of it was then said to be this or that;" so I was by at the making of this statute; and it was at that very time said by the legislators, that it would not hinder any charitable distribution of a personal estate. Therefore it was decreed that the devise was good, and that the money should be invested in South Sea stock, for the charitable purposes mentioned in the will.

I was favoured with the two following cases on this same point, by a friend, eminent at the bar.

Grimmett v. Grimmett. 20 Feb. 1754. Lord Chancellor Hardwicke.

See 1 Wyat's Dickens. 251.

Wm. Grimmett by will, dated 13 March, 1749, devises to his brother Jas. Grimmett, 20l. a year, during his life, to be paid him half-yearly, out of the interest-money in the public funds, or mortgages, or any his real or personal estates of which he should stand invested; and gives the residue of his real and personal estate to his wife, for life, and to dispose of at her death; and then directs the remainder of his estate after his wife's death, to be divided into 24 parts, 19 of which he disposes of; and by codicil, dated the next day, he limits the remaining 5-24ths, after the death of his wife, and payment of his debts and legacies, and also the 20l. a year, after the death of his brother, to be applied in clothing and educating twenty poor boys, sons of parishioners of Brighthelmstone, in Sussex, in the principles of the protestant religion, agreeable to the present national and established church of England, &c. and that the 5-24ths of his estate after his debts and legacies paid, together with the 20l. a year after the death of his brother, or which should be deemed as an equivalent to the 20l. a year, 570l. to be invested in some of the public funds where there is a parliamentary security, to stand in the name

name of the trustees, until the whole can be laid out in the purchase of lands to the satisfaction of the governors and trustees, whom he had appointed; which lands are directed to be purchased in the names of the trustees to the uses aforesaid; that is, the interest, profits, and rents of the 5-24ths of his estate, together with the interest, profits, and rents of the said 570l. after the death of his brother, or the lands which should be purchased therewith, should be applied annually *for ever*, in clothing and educating twenty poor boys, as aforesaid.—The testator left no real estate.

Two questions—1. Whether the devise to the charity is within the statute of *mortmain*, and void?

2. If it is, where the money so devised shall go? whether to the next of kin of the testator, or pass to the wife as part of the residuum?

On behalf of the charity was cited Soresby and Hollins, and Grayson and Atkinson, 7 Nov. 1752.

Lord Hardwicke, chancellor.—Q. If this is a good and valid disposition of the 570l. and 5-24ths of the remainder of testator's estate, or void by the statute of *mortmain*?

I think it would be hard construction to say, such a charitable bequest is void by statute. If a person directs money to be laid out in lands for a charitable use, it would be void, although the court would order the money to be placed in the funds till the purchase is made: so where a man gives it in such a manner, that the land to be purchased is the final end and thing given. But where there is sufficient room for the court to say, there is a discretionary power in the trustees to lay the money out, one way or other, either in the funds or in lands; I have determined such a devise to be good, as in *Soresby and Hollins*, and *Grayson and Atkinson*. I

am of opinion there is room to construe this bequest with such latitude.

I do not lay any weight on the directions to place the money in the funds, in the first place; for that would be to make the validity of a will depend on the order of the words: the direction is, *to place the money in the funds until laid out in lands to the satisfaction of my trustees*: when can that be? not while this statute is in force. Suppose it had been, *if by law it may be*, such bequest would be good. Those words must mean when the trustees approve of laying it out; that cannot be while the statute of *mortmain* is in force; it would be to act contrary to their trust. It was said, the rule of construction as to devises of money to be laid out in lands is the same now as it was before the statute of *mortmain*; that is true. But suppose the trustees in this case would not act; the trust would devolve on the court; and I would order the money to be placed in the funds, and not invested in lands. Sir J. Jekyl always did so, before the statute. I would not be understood to set up a different rule of construction of wills since the statute of *mortmain*, from what prevailed before; this would, in my opinion, have been a sound rule before the statute.

An observation arises on the face of the will; as if the testator had thought this bequest might continue on government security for ever. He directs the application of the interest, profits, and rents of the 5-24ths, and of the 570l. or of the lands which should be purchased therewith. It being in the disjunctive, seems to give an election—the words *for ever* are applicable to both alternatively. No mischief will follow from hence; this is a different sort of charity from those pretended ones in the time of popery and monkery.

John

John English, 14th January, 1753, made his will, and gave his debts, securities, and ready money, to trustees, in trust, until they could meet with a purchase of lands, and should actually purchase the same, to pay the interest of 120l. to and among such poor and necessitous persons, inhabitants in the town of H. as his executors should think proper objects of charity: and willed that the trustees as soon as they could meet with a suitable purchase, should lay out 120l. in the purchase of an absolute estate of inheritance in fee-simple, of messuages, lands, &c. to be conveyed and assured, and vested in trustees for ever, in trust, to pay and apply all the rents, &c.

English v. Ord. 9 July, 1754. Rolls.—Clark, master.

Clark, master of the rolls, said, that Lord-chancellor declared, that he did not think the case of *Grimmett* and *Grimmett*, clear; and that, if there had been express words of direction to trustees to invest, &c. it would be within the statute. He was of opinion that the second clause was directory, and not discretionary: He was not for carrying the case further than Grimmett's, and decreed the devise void.

2 Vezey, 182.

The first clause of the statute 9 Geo. II. c. 36. was intended to relate to gifts or conveyances to a charity by way of donation; and it is plain, that the legislature did not intend absolutely to forbid all kind of purchases of lands for the benefit of a charity; but has put them under some restrictions. The proviso was inserted in the house of lords, upon mention of the case of the charity of Queen Ann's bounty; which could not otherwise have gone on; as the method of executing it is, that the money arising out of that fund is laid out in purchase of real estate, for the augmentation of poor vicarages. Another consideration was, that this was not intended to prevent the execution of charities already established; in several of which the funds are

1 Vezey, 222. Atty.-General v. Day.

vested in trustees with intent to be laid out in lands; particularly *Dr. Ratcliff's* charity; but to leave them open, restraining the increase of such donations *in future*; that it should not be in the power of any person, or of a court of equity, to direct subsequent gifts of money to a charity to be laid out in land; for if that was their meaning, they might as well have rejected the whole bill; as the consequences would be, that a person might leave 3000l. to his executors, who might bring a bill in equity, praying a decree for laying it out in lands: yet in this very clause, relating to purchases, it might be considered how far they are taken out of the statute. The meaning was, that where such purchases are made, they should not be left precarious in point of time: so that though the party should happen to die within the twelve or six months, yet the person who paid the money should not lose his purchase, or be put to risk the recovery of it back, as there might not be assets, or stocks might fall. But then the money must be actually paid; in which I doubt whether the other restrictions, exclusive of the limitation in point of time in life of the party, will take place on this proviso, and am rather of a different opinion; for sometimes the money is paid on articles before a perfect conveyance, and then it would be sufficiently taken out of the act, notwithstanding the circumstance of deed indented and inrolled is not complied with; the intention of the act being complied with by the actual payment and conversion made of one kind of estate into another; but in the present case the money was not paid.

Such was the opinion of Lord-chancellor Hardwicke, on a material case, where one *Elbridge* being likely to die, made a conveyance of a real estate for benefit of a charity. Ten days afterwards he made a will, giving 3000l. the exact value of the lands, to the same charity; and

and 250l. to the same; and gave the estate to two persons as tenants in common. Under a former direction, the master had reported a scheme for carrying the charity into execution, and a decretal order was made confirming the report; the devisees had acquiesced, but their heirs-at-law had taken upon themselves to dispose otherwise of the land; and so the charity were put to their information to seek further aid from the court: when his lordship delivered the above opinion, and went on to say—There is something in this case, which may lay a great opening to evade the act; although *J. Elbridge* might not have intended any such fraud: but if such a precedent were made, it would be followed by a person, who, knowing if he died within a year after the conveyance, the act would make it void, gives the exact value thereof in money the same way, and then the one to be laid out in purchase of the other. The testator's intent makes it worse, and creates a reason against it: this, though mentioned as a barbarous act, is quite otherwise; far from being a prohibition of charitable foundations, it only restrains this method; leaving the disposition of personal property thereto free. The particular views of the legislature were two; first, to prevent the locking up land and real property from being aliened, which is made the title of the act: the second, to prevent persons in their last moments from being imposed on to give away their real estates from their families. The present case does not relate to the latter view, although that was a very wise one; for by that means, in times of popery, the clergy got almost half the real property of the kingdom into their hands; and indeed I wonder they did not get the rest, as people thought they thereby purchased heaven. As to the other view, it is of the last consequence to a trading kingdom; to which the locking up of lands is a great discouragemennt. This

indeed has not so much relation to the statutes of *mortmain* as is thought; which had another view, viz. of services of the crown; and therefore the reasoning, producing this act, is more like the political reasoning relating to the statute of *Westminster*, II. of Intails. Then it would be inconsistent with that view of the legislature, if this court should decree this order made on the master's report (which would not have been made had it been then fully considered) to be carried into execution in the purchase of land; as it would be attended with all the bad consequences of such a devise. Where such charity is created *de novo*, the better rule is, to hold it to be laid out in some personal property, for which the funds are convenient, affording commonly a better and readier income than land; and it is worth observing how early laws were made to prevent the mischief of mortmain, viz. about the 3d century, by one of the first Christian emperors.

Amb. 451. Atty. v. Heartwell, 1764.

By a will made previous to this statute, the residue of personal estate was bequeathed to be laid out in land, and settled to charitable uses; but by a codicil made subsequent to the statute, the testator gave other legacies, and confirmed his will. It was held that the codicil operated as a new will of the personalty, and the former bequest was void.

Ante ch. i. s. 3.

See the former cases decided as to real devises.

A bequest of money, to be laid out in land for an annuity to a minister to preach an annual sermon, and keep a tomb-stone in repair, and to a corporation for keeping account thereof, was deemed a charitable use, and void by the statute.

Durour v. Motteux, 1740.

A bequest to the corporation of Queen Anne's bounty was adjudged to be void, because the principle of that society is to invest in lands. *Richard Widmore* bequeathed thereto 200l. to augment a poor vicarage in *Bucks* or *Southampton*,

Widmore v. Woodroffe. Amb. 637. 1 Brown, Cha. Rep. 13.

Southampton, and gave one-third part of the residue of his personal estate to that corporation, another third to some *public charity*, declaring a preference thereof for augmentation of poor vicarages, or the propagation of the gospel; and another third part to be distributed amongst the most necessitous of his relations, by the father and mother's side; and appointed plaintiffs executors: he died, leaving defendant the only next of kin on both sides, being the only child of testator's sister. Two questions were made by the next of kin:

1. Whether the legacy to Q. Anne's bounty is not within the statute of mortmain, as the governors are bound by their own rules, confirmed by the king under the great seal, to lay it out in the purchase of land?
2. Whether this next of kin is not entitled to the third part of the residue given to the most necessitous of his relations by the father and mother's side?

See *Roach* v. *Hammond*, Pre. in Ch. 401; *Thomas* v. *Hole*, Ca. Talbot's time; *Carr* v. *Bedford*, 2 Cha. Rep. 146; *Griffith* v. *Jones*, ibid. 394; *Isaac* v. *Defrien*, 1754; *Brunsden* v. *Woolridge*, 1765.

Lord-chancellor *Camden* declared the legacy to the corporation could not be supported. The charter of rules reserves a power to the crown to alter, vary, and make new laws. These were in force at the testator's death, when the legacy was to take place. By the 13th rule, donations not given under particular directions are to go as the general fund. It was argued, that the word *purchase* was not to be confined to purchase of land only. But his lordship held he was to take it in the sense the crown did when the rule was made. The word *purchase* is put in opposition to *pension*. The 16th rule is decisive: it directs the money to be laid out in the public funds or securities

securities till laid out in purchase. Q. Whether any particular directions in this case? Argued, That considering the statute of mortmain, the court may collect a particular direction from intention that it should be laid out so as not to fall within the statute. Though the mortmain statute has made considerable alterations, yet I do not understand it was made to prevent charities. I cannot consider it as given under a special direction, without adding many words to the will, which cannot be done. If there can be a general bequest to the corporation, this is one, except as to the counties in which the augmentation is to be made. The testator seems to have known the rules of the society in case of a donation of 200l. by adding another to it; and from thence I collect his intention that the legacy should be laid out in land. The cases cited are not applicable. *Soresby* v. *Hollins*, was in the *alternative*. *Grimmett* v. *Grimmett*, gave a latitude of option; and it was impossible, while the statute of mortmain stands in force, that it could be laid out in land to the satisfaction of the trustees. There was no solemn determination in *Grayson* v. *Atkinson*, but loosely taken up by asking a question of Mr. Montague, the secretary of the society (one of the masters in chancery), who was upon the bench. It was a small legacy of 40l. It appears by the register's book, that the question was reserved, and never came on again; so that case is out of the way.

As to the next point, Whether the court should adjourn the cause till new regulations are made? I have no doubt but the crown may alter and make new laws; but they cannot have any retrospect. The legacy must vest at the death of the testator, or be void at that time; and the right vests in another.

To the second question, several cases have been cited, all proceeding upon the same ground, making the statute of

of distributions the rule to prevent an inquiry, which would be infinite, and would extend to relations *ad infinitum*. The court cannot stop at any other line. Thus it would clearly stand on the word *relations* only; the word *poor* being added makes no difference. There is no distinguishing between the degrees of poverty; and therefore the court has, as was unanswerably argued, construed the will as if the word *poor* was not in it.—2 Vern. 381, was taken up by Lord Keeper Wright as having found a single precedent, and he was glad to lay hold of it; but all the other cases cited on the other side are uniform and clear.

Where a residue is bequeathed to charitable uses, and it turns out to be more than adequate to the number of the objects, the whole must be applied to similar purposes.

Mich. Term, 1791. Attorney v. Earl of Winchilsea and others.

The Rev. *Robert Chapman* gave all his residue to his executors, in trust, to pay 12l. *per ann.* to a proper schoolmaster, for teaching all and singular the children of Ravenstone to read, write, and cast accompts, at some convenient place there; to lay out 20s. yearly in the purchase of such books as they should think proper for the use of the school, and apply the surplus, if any, in clothing, and putting out apprentices to any trade, business, or occupation that should be thought proper for them, two children of the parish of *Ravenstone*, and one child of *Little Woolston*; and to meet once a year, to inspect the management of the school, audit accounts, &c.

2 Br. 373.

See duty on Bindings. Post. part 3. c. 3.

The testator died in 1785, without leaving any wife or children, or other next of kin than his only sister and nephew. The information prayed the establishment of the charity; and that, if the residue was more than sufficient, the charity might be extended.

The

The nephew, one of the next of kin, claimed a distributive share of such surplus, and stated that considerable part of the residue consisted of *mortgages*, or some other real securities. But the sister disclaimed any right or interest, being desirous that the charity should be established.

The executors admitted mortgages to the amount of 2200l. and a surplus beyond the precise number of objects specified by the will; and submitted that the charity ought to be extended.

It was referred to the master, to take an account of the personal estate.

After the decree, the sister assigned all her interest in the mortgages and residue to the trustees, for the benefit of the charity. In consequence of this assignment, a supplemental information was filed, and the cause came on again.

Two questions were made:

1. Whether the bequest of the residue, so far as it related to the real securities, was not void, as being within the statute of mortmain?
2. Whether the surplus should not go to the next of kin; or whether the court should not consider the whole as disposed of by the testator, from the next of kin, and be at liberty to extend the charity by enlarging the number of the objects?

Master of the Rolls, *Arden*.—The question is, Whether the whole surplus of this personal estate is not intended to go to the charitable purposes mentioned in the will, though more than sufficient to answer the exact number of objects there specified? The real intention of the testator is *perfectly clear*, that he meant to give the whole surplus. It has been said that the distinction is, that where there is a definite object, and that cannot take

take place, the court will not look for another object, but let the property go to the next of kin, or the heir-at-law; as in the *Attorney-general* v. *Bishop of Oxford*, the only object the testator had in view was the building a church, or, in fact, creating a pillar of vanity; that was his sole idea, and nothing short of that could answer his intention: and therefore the object must be effectuated in toto, or the property fall to the next of kin. So in the *Attorney-general* v. *Goulding*, where Mr. *John Bailey* seems to have gone to a great extent, and as far as the case would well warrant him, it was held that the testator had no general intention beyond that specified in his will, and consequently that the bequest must be confined to the precise object, and not beyond it; but wherever the intention has been to dispose of the whole property to certain purposes, as in the early case of *Thetford School*, and numerous subsequent authorities, the whole has been applied: the intention has been considered as such, and it has been only inferred that the testator has been mistaken merely as to the *quantum*. It has been observed, as a strong mark of his intention, that by giving the apprentice-fees to three objects, he has marked out the limits of his bounty, and that the confining it to that number will be a sufficient compliance with his intention: but, according to the disposition of this residue, his intention could not be limited to three boys; and if it would pay more, the testator has shewn an intent that the surplus beyond that must be applied in the same manner; therefore I am of opinion that it must be applied to the charitable purposes mentioned in the will. Perhaps it may not turn out to be much more than sufficient; but if it should, the next of kin may then come to the court, as in other cases, where there has been an increase of rents and profits—and decreed accordingly.

1 Br. Cha. 444.

2 Br. Cha. Rep 428.

8 Co. 130. 2 Vern. 397.

A bequest

1792, July 19. Grieves v. Case. F. Ves. 548. 4 Br. 67.

A bequest of money to be laid out in land for establishment of a minister of a chapel, is void, and not supported by supposing a discretion in the trustees not to lay it out in land; the directions being imperative.

Testatrix having endowed the chapel of *Fakenham*, directed, by her will, that 600l. should be laid out in freehold lands, or copyhold with fine certain, and the rents to be applied to pay some small annuities. And "all the residue" she directed to be paid "in equal moieties, one to my friend *Thomas Mendham* for his natural life, the other to my friend *Samuel Eastaugh* for his natural life: and after the decease of *Mendham*, one equal third part of the interest or rents to be paid to the preacher or teacher for the time being, who shall statedly officiate in the chapel at *Briston*, belonging to *Mendham*; the other two-third parts to *Eastaugh* for his life; he and the said preacher exchanging upon Lord's day alternately, the one at *Fakenham*, the other at *Briston*; provided that *Mendham* and *Eastaugh* do not voluntarily withdraw from and refuse officiating, when able, at the said *Fakenham* chapel as usual: if they do during such recess, the share of him or them refusing, to cease and go to the preachers appointed in his or their room. And after the decease of *Mendham* and *Eastaugh*, and the survivor of them, the interest or rents to be paid for ever to the preachers for the time being, who shall be chosen by the trustees of *Fakenham*, and the trustees and major part of the communicants of *Mendham* chapel at *Briston*."—There was a proviso, that in case of *Eastaugh's* apostacy, he should have no claim under this devise.

The coheiresses filed this bill; and Lord Thurlow had decreed that this devise was not void, so far as concerned the immediate annuitants.

On further directions, two questions were made:

1. Whether, in order to support the charity, it was not

not possible to consider the trustees as not bound to lay out the fund in land?

2. If not, whether the interest of the two annuitants *(Mendham* and *Eastaugh)* could be maintained, as being separated from the charitable trust, and intended as a personal bounty and favour to them?

The Attorney-general cited *Grimmett* v. *Grimmett*, Amb. 210. in favour of the charity, as considering the trustees not bound to lay out the fund in land.

It was contended for Mendham and Eastaugh—There are no such words in 43 Eliz. as *maintenance for a minister*, and it is not within the statute, though within the equity of it. The only ground whereon this case can be taken to be a charitable use within the statute, is, that it is a provision for benefit of those to whom the religion is to be administered, not for the particular clergyman; for, giving a charity to provide a clergyman, cannot be deemed a charitable use with regard to the person, any more than a gift to any other person can be charitable for the benefit of the person to whom it is applied; as, to provide a surgeon for an hospital, &c. here it is a personal benefit, as in *Doe* v. *Aldridge*, and *Barrington* v. *Bishop of Hereford*.

1 Eq. Ca. Ab. 95.

4 Term Rep. B. R. 204.

Solicitor-general denied the authority of that case, and said the whole of the will had not been stated.

Lord Commissioner *Eyre*.—The question made by the Attorney-general must be first noticed. Whether this can be a good disposition to a charitable use, in respect of its being possible to lay out the fund otherwise than in land? For that, a case from *Ambler* was cited. The whole of that case rests upon a critical comparison of words. The words in that case were, "such purchase as is to the satisfaction of the trustees." If the question could be rested upon the similarity or synonimy of the two cases, it would be a fair argument. But I think, without

without saying whether I approve of that case or not, that this is substantially distinguishable, and upon the ground stated by Lord *Hardwicke* there; for he says, if it had been a disposition of money to be laid out in land, he should have been obliged to have said it was within the statute. Now this is that very case. Therefore, the case cited will not apply; and it stands upon so much nicety, that it is not proper to extend it to cases in which every part of the circumstances of that case does not occur. This devise, therefore, is void, within the statute of mortmain. The next consideration is, Whether these two persons are to be considered as having an interest detached from the trust, so as to be separated from the trust, though that should be condemned? It is said to have been the opinion of the late Lord-chancellor, that they were to be considered as entitled to a life-estate, notwithstanding the trust was not maintainable. That opinion is the only circumstance that raises a doubt in my mind as to the true construction of the will. The case from the *Term Reports* does not, upon consideration, bear upon this at all. But that opinion is a great authority, and deserves much consideration. Whether, according to the observation of the *Solicitor-general*, every part of the will fell under the eye of Lord *Thurlow*, it is impossible for me to say. But the unfortunate circumstance is, that that opinion does not bind me, as the decree has not gone far enough to include that question; for though the language of it is, that that devise was not to be considered as void, so far as respects the immediate annuitants, I cannot comprehend these two persons under that description. The testatrix has determined whom she meant by those words; for she comprehends expressly the persons, to whom the small annuities are given, as her annuitants; and there is nothing in the decree to authorize me to suppose the Lord-chancellor meant

meant to comprehend more under those words than she did. Besides, in propriety of language, these two persons were not annuitants. The others, who had small sums given out of the whole, were strictly so; but not these two, who take the whole residue, or the rents and profits of the fund, if the fund is laid out in land. Therefore under this decree it is void, as against them in that character. Then can they be so separated from the general trust that this court is bound to condemn, as that their interest can be maintained, though the interests of those who come after them cannot. It appears to me, that the object of the testatrix was to make a disposition to a charitable use; and though some arguments at the bar tended to shew the establishment of a minister not to be a provision for a charitable use, yet that argument upon the whole falls to the ground, because it is admitted that, in respect of the benefit which the flock are to derive from the exhortations of the pastor, *it is a charitable use*. Here the general object was to make an establishment for the two chapels at *Briston* and *Fakenham*. The latter was her own, which she had founded, and which was apparently her first object. *Mendham*, it appears from the will, was the stated preacher at *Briston*, and *Eastaugh* was one of the stated preachers at *Fakenham*; but both, as appears by the will, were alternate preachers at *Fakenham*. Having a general object to provide for both chapels, and having apparently a great confidence in *Mendham*, and a reliance that that chapel would be taken care of without a special provision in his life; and having a view that in all events *Fakenham* should be provided for, as it had been, by the alternate preaching of both; she begins with giving them an estate for life in these premises, with a condition annexed, that they do not voluntarily withdraw, or refuse to do the duty they were accustomed to do at

Fakenham. After the death of *Mendham*, when another preacher, whom she did not know, was to be appointed for *Briston*, she then comes to a more general idea of an establishment for both chapels. When *Mendham* drops, she arranges it in this way; that *Eastaugh* shall then take two-thirds, and the preacher at *Briston* one-third. But she expressly here makes that provision part of the trust and general object of the charitable disposition, because she has annexed to that, that they are to preach alternately at *Fakenham*. I lay no stress upon that proviso, that if *Eastaugh* apostatizes, he is to have no part of her bounty, but to observe that it shews the consideration of her bounty to these two persons; and that consideration affords the true construction.

It was argued with great force, that there was a personal bounty intended to them. I agree there was; but it was equally apparent that it flowed from a confidence in them, in the character of ministers of these chapels, and not in any other way. Then it comes to the question, Whether, if a plain trust and disposition to a charitable use is manifested by the will, and intended throughout, but if that disposition is also manifested with a certain degree of personal bounty and favour to particular objects, that will take the case out of the statute? But I am of opinion, that if the personal bounty cannot be totally separated from the general object, in respect of which they are to have that preference, it is not sufficient; and it is proved clearly by the admission of Mr. *Milford*, that if there is a general disposition to a charitable use, and the testator appoints the first preacher to exercise that function, that would be a case within the statute. That establishes the principle, that mere personal favour, and confidence, and benefit too, manifested essentially by the preference made of one to the other, as the first object of her bounty, will not separate that favour from the

the trust. It was manifestly her intention to make a general provision for the two chapels; to suspend that as to one, till the death of *Mendham*; and to continue it as to the other, from the moment of her death, and during his whole life: and consequently there is a charitable use subsisting from the moment of her death as to *Fakenham* chapel; and these persons have this bounty only in respect of that charitable disposition, consequently their estate cannot be separated from the trust; and if that fails, this, which is a part of it, must fail also.

Then, as to *Doe* v. *Aldridge*, the comments which have been made save me the trouble of saying much upon it. But we need not quarrel with that case; for though we may collect circumstances enough to see what the testator in all probability did mean, yet it is an answer, that where he says he expects the devisee will promote the service of God, in those general words, the trust, which would be raised by the word "expect," would fail, because it is not sufficient to connect it with the other trust. If therefore there is a fair objection to connecting with the life-estate the subsequent trust, that estate is not a disposition to a charitable use. Therefore that case does not apply to this: for there is no benefit here intended to these persons distinct from this;—that they had officiated at these chapels, and were intended to do so. Therefore the whole of this disposition, after the annuities, will fall under the general objection of a disposition of money to be laid out in land for a charitable use.

Lord Commissioner *Ashhurst*.

Upon the first question, I am clearly of opinion that the bequest is void in its nature. Those who have argued in favour of it, have relied upon that case in *Ambler*, in which Lord *Hardwicke* did not think the devise absolutely

solutely void: but that was entirely founded upon the wording of it. It was not a gift of money absolutely to be laid out in land; and though Lord *Hardwicke* did consider the case with a view to its being in the power of the trustees to lay it out so, if they thought proper, yet, as it was not obligatory upon them, he thought they would not in their discretion do an act which would be nugatory, but would suffer it to remain in the funds, by which means it would not be within the statute. As he went in that case on a criticism upon the words, we cannot do it in this case; for the direction is imperative on them to lay it out in land.

The next question is, Whether there is any thing to distinguish the case of these two persons? I think there is not. It is true, the testatrix does appear to have had a particular predilection for them, from her long knowledge of them. But what was her general intent? It was to appoint a perpetual chaplain in these two chapels: and this appointment of these two was only the inchoation of that charity. It is true, during their lives she makes a particular qualification as to the application of the fund respecting those two, which is not meant to extend to future preachers. They are to take in moieties this benefaction; but her intention was as much to tie them down to the exercise of their function, in these chapels, as those to come after. That is plain from the will, which makes it as much a charitable bequest with regard to them, as to the others. As to the case in the *Term Reports*, we may give it due merit, though perhaps it was not looked into as much as it might have been. The foundation of that idea was, that it was nothing more than a bequest beneficial to the party, without annexing to it a stipulation of preaching in the chapel; which made it a charitable bequest as to the future preachers. Here it is expressly annexed to these two intents

intents, which distinguishes this case from that.—Therefore I concur with Lord Commissioner *Eyre*.

Before I quit this part of the subject, it may be proper to notice the cases of *ademption* of legacies to charities, which stand on the same principle of other ademptions, and very little may suffice to elucidate the doctrine. Ademption.

The defect of a surrender of copyhold estate devised to a charity may be supplied; and securities bequeathed, but afterwards paid to the testator and reinvested, still belong to the charity, with interest.

By the will of Rev. *Richard Parkin*, in 1759, the reversion of a freehold estate was devised to Pembroke-hall College, Cambridge, and a copyhold estate (not surrendered) to his sister for her life, on condition that she should settle the same upon that college, and give security in one month after his decease to do so, as the society should approve, otherwise he gave the same to the society at his death: and then specifying some mortgages, bonds, and notes due to him, he gave out of the interest thereof annuities to two of his sisters, on condition that they should neither marry nor controvert his will; and after their deaths he vested all those securities in the college, with the remainder of the interest. He also gave a considerable sum due to him for interest on three of the mortgages, with other part of his personal effects, to be invested by his executors on good security, and gave the income thereof to his sister Sarah, for life, and the reversion to the college. He died in 1765, and the relators filed their information against the executors to establish the charity, and for an account. Atty.-Gen. v. Parkin and others, 1769. Ambl. 566. s. c. 1 Dickens, 422.

The relators, as a ground for their refusal to account, insisted that there had been great variations and additions to the testator's personal estate after making his will, the same, at his death, having consisted principally of money

due to him on mortgages and other securities, and that many of such were made, and the money lent after making his will, and that the relators were entitled *only* to such mortgages and securities, or the benefit of them, as were particularly described in the will, and were subsisting and unsatisfied at his death; and not to any part of the money due on the mortgages or securities made to him after making his will; but that the residue of his estate was to be considered as undisposed, and that his sisters, as his next of kin, were entitled thereto.

The relators claimed the whole residue at the time of his death; and that the testator, after making his will, received the money due on several of the securities therein particularised, and placed out the money, and other money which he had saved, at interest, on other securities, and which remained due and unreceived at his death: that all the money which remained due thereon at his death was, and ought to be deemed to pass as part of the residue of his personal estate, by and under his will, and that the relators ought to have the benefit thereof.

15 Nov. 1769. Reg. Lib. A. p. 111.

Lord Camden, chancellor, declared the will well proved, &c. and directed the charitable trusts therein to be established and carried into execution; and ordered Sarah Parkin to surrender the copyhold estate to such trusts and uses as the testator had directed; and declared that his sisters were entitled to the clear residue of the personal estate. That such of the debts bequeathed to the relators as were paid to the testator between the time of making his will and his death, whether such payments were voluntary or compulsory, the same were not adeemed by such extinction of these debts, but ought to be satisfied out of the testator's general estate—and directed an account of debts, and interest, and credit, to be allowed to the relators for all such sums as should appear to have been paid to the testator before his death,

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on the securities specifically bequeathed to them; and the respective interest, at 4 per cent. to be applied in the annuities to the two sisters, and the surplus to the bank, subject to further order; and the relators to present a scheme for carrying the charity into execution—and costs out of the estate.

The cases relative to ademption of legacies all concur in establishing the doctrine, that a testator's receiving a debt after he had bequeathed it, is not an ademption or revocation of the legacy, but an intended security to the legatee. In *Pawlet's* case it was held, that the testator thereby meant the legacy should be as certain to the legatee as he could make it: and a case is cited there of *Squib* v. *Chicbely*, wherein the difference was maintained between a legacy *in numeratione*, and a specific legacy; for in the first case the legacy will remain, though the debt, *ex quo*, be paid in; but the specific legacy may be lost by being altered, as *Johnson's* case. Raym. 385. 31 Car. 2. Godsb. 91.

In the *Earl of Thomond* v. *Earl of Suffolk*, it was settled, that when *part* of the debt bequeathed had been afterwards released by the testator, but not received by him, this was no ademption of the legacy *pro tanto*, but that the legatee was entitled to the *whole* debt, as much as if it had been paid in; and that the receipt of a debt bequeathed was no revocation of the will. 1 P. W. 464. 1718.

In a subsequent case of *Ford* v. *Fleming*, it was held, that if a debtor, who cannot be compelled to keep it, voluntarily pays in the debt, so that it is his own act, and the creditor is bound to receive it, this is no ademption of the legacy; for it must be the act of the testator, and not the act of the debtor, who is a third person, which is to revoke the will. The receiving the debt increases the personal estate; and where the debt is called in by the testator himself, it may be presumed to have arisen from his apprehension that the debt bequeathed 2 P. W. 469.

2 Vern. 681. Swinb. 432. 3 Will. 386. Ca. Talbot, 226.

by him was in danger, and therefore to have been done in favour of the legatee, and what was done out of kindness to him ought not to be interpreted to his prejudice.

Atty. v. Pye, 1738. 1 Atk 435. Lawson v. Stitch, 1738. 1 Atk. 507. Roome v. Roome, 1744. 3 Atk. 381.

A debt of 1000l. bequeathed to the Coopers' Company to build alms-houses, proved to be only 365l. was maintained. But if the testator recovers the debt at law, the legacy is adeemed. Ademptions are confined to cases where the testator applies the money to the same purposes as those for which he had bequeathed the debt.

SECTION VII.

Devises or Bequests for intended Uses.

THE court has favoured devises for intended charities, although they were not in *esse* at the time of the charter, or of the will of the founder; and it has been fully established, that devises for a foundation subsequent to, and consequent upon a charter of incorporation, are valid as operative acts upon that previous license.

10 Co. Rep. Trin. 10 Ja. 1.

The case of Sutton's Hospital, and the decision upon it, set this question at rest, and confirmed the right of the patentee to found his charity after he had received his license to purchase and erect the foundation.

Baxter, the nephew and heir-at-law of *Thomas Sutton*, within a year after the decease of his uncle, brought trespass against the executors of his will, and a special case was reserved on all the points urged at the trial; all of which were reducible to one, that the act of incorporation was previous to the foundation; against which objection it was maintained for the establishment, that the crown has the power to give the means, by creation of a capable body politic, by way of incorporation, to have a perpetual succession to perfect and perpetuate the charitable work intended; that the incorporation being present,

present, and the execution of the license future, the incorporation ought of necessity to precede the license; that the true meaning of the words "to found, erect, and establish," is to lay the foundation of a building whereon to erect the house, and there to establish and make the society to have continuance; that it is impossible to take in succession for ever without a capacity, and this cannot be without previous incorporation; and it is not until after the act of incorporation that any town or society can have this capacity: hence it must precede the donation of land; that the other part of the license to a new incorporation is to take in mortmain. This is not of necessity, either of the essence of the incorporation or of its continuance, for the corporation is perfect without it; but yet it is requisite for the establishment and maintenance of its end, viz. to have the poor sustained, the scholars instructed, &c. for they cannot be maintained without a revenue, and they cannot take and retain a revenue without a license in mortmain, and therefore the incorporation and license ought to precede the donation: that the words, to found, erect, and establish, cannot be extended to the incorporation, for that belongs to the crown, nor to any donation of land, for as yet there is not any capacity; therefore they extend only to the completing the building: that the founder may do these acts without license, but his application to the crown is to give succession and perpetuity to his foundation, which cannot be without it: that the founder, by his application for the charter, signs his consent, and thereby waves any right of objection, that the crown could not give a name and perpetuity of inheritance to the lands, and inheritance of any one; the crown names the incorporation, and gives the capacity, and leaves it to the founder to perfect all the mechanical part of the establishment; that the law has not restrained incorporation

ration to any prescribed and incompatible words; and when the corporation is duly created, all other incidents are tacitly annexed: and amongst others the license to purchase in mortmain.

1 Roll. 513. 10 Rep. 30.

That although the officers and members are not chosen till after the date of the charter, yet they are chosen under its authority, and are immediately incorporated thereby: it is immediately, by the letters-patent, a corporation *in abstracto*, but not *in concreto* till the naming of the master. That a void space, on which a house is intended to be built, may, by the king's charter, be named a house, and this is sufficient to support the name of the incorporation; as the hospital of St. John of Jerusalem and of the Knights Templars was incorporated in 14 H. I. but neither the fabric of the temple, nor the house of the hospital, were built till the reign of H. II. the one by *Jordan Bissett*, and the other by *Heraclius*, patriarch of Jerusalem; so the Savoy was founded by H. VIII. upon a charter of H. VII. There is great reason that an hospital, &c. in expectancy, or intendment or nomination, should be sufficient to support the name of an incorporation, when the corporation itself is only in abstracto, and rests only in intendment and consideration of law; a thing which is not *in esse*, but in apparent expectancy, is regarded in law—as a bishop who is elect before he is consecrated. So for a corporation it is sufficient to name a place, &c. for that imports truth and certainty.

Plow. Com. 501. b. 2 And. 208. Moor, 233 1 Leon, 159.

Mat. Paris, 64.

That in law there are two manners of foundation, one *fundatio incipiens*, and the other *fundatio perficiens*; and therefore *quatenus ad capacitatem & habilitatem*, the incorporation is metaphorically called the foundation, for that is the beginning, as a foundation, *quasi fundamentum capacitatis*, preceding the whole; but *quatenus ad dotationem*, the first gift of the revenues is called the foundation,

foundation, and he who gives it is the founder in law; and that is proved by the statute of Westminster, where the collation or gift of the tenements is called the foundation. *Si autem domus*, &c. He who gives the first land is the founder. That if the king incorporate the poor of the hospital, the founder need not make any instrument comprehending any foundation, erection, &c. but his gift of the land being the first gift, makes him the founder, and the first donation is all the foundation which is requisite in law; and to the erection of an hospital, &c. there is not in law any thing requisite but incorporation and donation. The first dotation is the foundation, which is to be understood with this distinction, that where the crown expresses the words, designs the place, appoints the number, and gives them a name by charter, so that it is a complete corporation: there the founder hath nothing to do but to make the dotation without any instrument, comprehending the words *found, erect, establish*, &c. for the common person, who is the founder in such case, has nothing to do in the work of incorporation; but when the crown by charter reserves as well the nomination of the persons as the name of the incorporation, to a common person who shall be the founder, there he ought to name the parties, and declare by what name they shall be incorporated, and when he hath done this by writing then they are incorporated by the king's letters-patent, and not by the common person; for he is but an instrument, and the king makes the corporation in such case in the same manner as if all had been comprehended in the letters-patent themselves; for none but the king alone [or the parliament] can make a corporation. A subsequent bargain and sale, conveying the lands by purchase for a valuable consideration to the governors so incorporated is valid, although the *habendum* declare the trust; and their pleading may be, that they are

Westmin. 2. c. 41. 2 Inst. 457. 6. F.N.B. 211. 38 Ass. p. 22. 1 Roll. 514.

1 Roll. 133. 512. 1 Anders. 210. Br. Prescript. 12. 10 Rep. 33. 6.

are seized in their demesne as of fee in right of their incorporation, &c.

These points were settled with the assent of all the judges, and of Lord *Ellesmere*, chancellor, against *Sutton's* heir-at-law, who afterwards signified some contrition at having instituted the suit—

Westm. 2. ult. cap. *Summa Caritas est facere Justitiam omnibus personis omni tempore quando necesse fuerit.*

Much of this doctrine will be found to have directed the late case of Downing College.

Sir *George Downing*, of Gamlingay Park, in Cambridgeshire, by his will, dated 20th Dec. 1717, devised to trustees divers lands, freehold, copyhold, and leasehold, for several life-estates, with remainder finally in default of certain issue to the same trustees and their heirs, in trust out of the rents of said lands to purchase the inheritance in fee simple of some piece of ground in Cambridge, proper for erecting a college within that university, to be called *Downing College*; and that a charter should be applied for to incorporate the same, and when founded, that the trustees should stand seized of the lands to be so purchased, for the use of the collegiate body and their successors for ever.

Testator died in June, 1749, without revoking or altering his will, but by a codicil charged his estates with two annuities:—all the devisees for life dying without issue, the estates devised became applicable to the purchase of land to found the college. The trustees all died in the testator's life-time. The testator's cousin, Sir *Jacob Garrard Downing*, was his heir-at-law and executor, who dying and leaving Margaret his widow and executrix, she claimed the leasehold estates, and the freehold and copyhold were claimed by the surviving heirs-at-law of Sir *George Downing*. The copyhold lands had never been surrendered to the use of the testator's will.

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On an information at the instance of the chancellor, masters, and scholars of the University of Cambridge, to establish the will and confirm this charity, it was set forth in Lady Margaret Downing's answer, that Sir George Downing purchased several freehold estates after the making his will; that the whole lands were charged by the codicil with two annuities, and that the personal was not applicable thereto; that Sir J. G. Downing found the estates in a ruinous condition at the death of Sir George, and had laid out 30,000l. in improvements; that part of the lands devised were held under lease from King's college, and from the dean and chapter of Ely, some of which Sir George had renewed, and some had expired in his life-time, since making his will; and other of said lands had come to him only by mortgage. Adeemed, Amb. 573.

The several points that were the principal subjects of argument were as follow:

1. Whether the trust were not lapsed by the death of all the trustees in the life-time of the testator Sir George Downing? And cited *Atty.-gen.* v. *Hickman*, 5 Geo. II. Select Ca. Equity. Duke on Charitable Uses, 81. Finch, 245. 1 Vern. 224. *Atty.-gen.* v. *Syderfen*, and statute 43 Eliz. under which courts of equity will carry trusts into execution.

2. Whether the devise for the erection of the college was a charitable use, and protected by 43 Eliz. or void under the statute of *mortmain*?

3. Whether the devise was within the 9 Geo. II. c. 36. the will being of a prior date to that act; but testator having died since? And—

4. (Which was the great question in the cause) Whether a devise to a corporation not *in esse*, and the existence of which would depend on the will of the crown (supposing it a charitable use), could be established by a court of equity?

Besides

Besides the foregoing, there were several subordinate questions; as—

1. Whether the copyholds not surrendered to the use of the will passed by way of appointment or not?

2. Whether the leasehold renewed after the date of the will passed? [Adeemed by renewal, Ambl. 571.]

3. Whether the real estate was charged with certain annuities, in exoneration of the personal, or only as an auxiliary fund?

4. Whether the university had any interest at stake, so as to sustain the question? (This point does not seem to have been seriously contested.)

5. Whether certain erections (as barns raised on rollers) among the improvements on the estates by Sir J. G. Downing, were to be considered as fixed to the freehold or part of his personal estate?

6. Whether the limitations in Sir George's will were of trust estates or of uses executed?—Of this the court seemed clearly satisfied; holding them to be trusts, such as related to the intended new college.

7. Whether the codicil was a republication of the will, so as to pass certain after purchased lands?

8. Whether certain lands mortgaged to Sir George, and of which he had been long in possession, though the equity of redemption was not released or foreclosed, passed by the will?

As to the four principal points that arose: on the first, some cases are cited above, which induced the court to be of opinion that the trusts were not lapsed by the death of the trustees in the life-time of the testator. And Lord *Camden*, chancellor, said, the death of the trustees is immaterial; there are persons now living, that may apply to have the trusts carried into execution; and he mentioned the case of *Burgess* v. *Wheat*, where a devise is executory, the heir is compellable to carry the trusts into

into execution, where those trusts are meritorious: the court always considers the trusts as existing, though the trustee is dead.

On the 2d principal point, the following cases were cited: In *Porter's* case, 1 Co. 24. it was determined, that a gift for the augmentation of the university was a charitable use, and therefore not within the statutes of mortmain.—Duke 74, 77, 81, 83, 84.

On the third principal point, the case of *Carvel* v. *Carvel* was cited, in which a devise not attested was held good, being dated before the statute of frauds: the testator dying after that statute.

On the fourth and chief point—It was argued for the university, that if the objection was founded, that there was no object *in esse*, it would hold in all cases where a trust is for a general purpose. That if a devise is for the encouragement of learning, the court will modify it, so as to render it capable of taking effect. That this is a charity both useful and ornamental. *Porter's* case cited above is a strong authority in point. In the case of *Sutton's Hospital*, the object was not *in esse* at the time of the conveyance. The *Savoy* was established under the will of Henry VII. though the gift was only for an intended hospital. Under the 43 Eliz. the court may carry these trusts into execution as far as it can. See Duke 81. Devise to the poor, though no distinct object, held good. A devise is never construed void, unless it is so dark that the court cannot find out the testator's meaning. The court has a free and extensive jurisdiction in the case of a charity, and is not confined to the formal methods requisite in other proceedings. *Martindale* v. *Martin*, is a strong case in point. *Asbburnham* v. *Bradshaw*, defective devises are good to charitable uses. All trusts of this sort are executory; the endowment must necessarily precede

Finch, 245. 1 Vern. 224. 1 Atk. 412.

1 Atk. 356.

Cro. El. 288, Duke, 74, 77, 83, 84. Hob. 136. Floyd's case. Collison's case. 2 Vern. 266.

precede the license. The case of Rugby school, or Baliol College. But see the case of Sutton's Hospital, ante 200.

2 Eq. Ca. Abr. Viner Abr. Tit. mortmain. Finch, 221. 1 Black. Rep. 90.

The foundations of St. John's and Sydney Colleges were to take effect after the testator's death. *Corporation of London* v. *Christ's Hospital*; *Atty-gen.* v. *Doyley*, 1735. Devise void at law, good in equity under the 43d Eliz. In *Tancred's* case, the uses were allowed to be void in law; but being a charity, they were held good in equity, and there the objects not so meritorious as here.

Lord Cowper directed Dr. Ratcliffe's trustees to apply for a license; the institution of travelling fellows, not so meritorious, as founding a house of learning.

Mr. Yorke admitted that this case was new *in specie*, but not *in genere*—That the devise is not void for want of a proper object, for the object is pointed out. This is not like *Edge's* case, 1 Salk. 229; it is not a contingent remainder. It is a present devise upon an executory trust, and being so, it is not material whether the license precedes or follows the devise. The licenses for the foundation of St. John's and Sydney Colleges were subsequent to their foundations. *Fitz. N. B.* 224. *Duke*, 163. 1 *Vern.* 345, is exactly in point, *Atty.-gen.* v. *Bromley*. The consent of the crown is obtainable *ex debito justitiæ*.

2 P.Wms. 369.

For Lady Downing, it was argued on all the foregoing points, that there being no *cestuy que trust, in esse*, the devise was necessarily void, even though to a charitable use.

That this devise is contrary to all the statutes of *mortmain*, and great stress was laid upon the inconveniences arising to the public from such alienations.

That the use is to arise at too remote a period. That it is uncertain and depends upon the will of the crown, or of the minister. That the case of the *Atty.-gen.* v. *Bromley*

Bromley and that on *Tancred's* will, are not applicable; being charities within the 43d Eliz. That in this case, the trusts are against law and a forfeiture under 15 Rich. II. Not so in *Porter's* case, the license to hold in mortmain ought to have preceded the will: F. N. B. 123. That the trust is not to arise until a corporation is erected. That whoever takes an estate *in futuro*, must take it in remainder, or as an executory devise; here it can operate as neither, the corporation is only *in posse*. That there was no corporation at the death of Sir Jacob Garrard Downing, therefore the devise was void. That it would certainly have been so, if to a private person. See Bro. Abr. Tit. *Mortmain*. 1 Roll. Abr. 609. ch. 50. Perkin *Pl.* 505. p. 221. Co. Litt. 264. 4 Leon. *Corpus Christi*.

That the 43d Eliz. is a remedial law, but under that statute the court cannot effectuate what the judges could not do by law: the law says, no land shall be given in *mortmain*; shall this court wait to see whether the crown will grant a license contrary to all the mortmain acts, and particularly the last? That the case of the *Atty.-Gen.* v. *Hickman*, was a case about personal estate merely. That the testator lived twelve years after the death of his trustees, and when he died the 9 Geo. II. had prohibited his giving his estates in mortmain. That the case in *Moore*, 62. being a devise to a trustee to sell, the sale was avoided by the death of the trustee in the life time of the testator. Why is the university to apply to the crown? the deceased trustees were the persons to apply. It is even doubtful whether the crown could incorporate a new society with the old body.—That *Porter's* case differs from this, for the only thing there determined was, that the devise was not to a superstitious use. That the cases of St. John's and Sydney Colleges, are not applicable, because Hen. VIII. co-

operated with the donors. That the court can only do under the 43d Eliz. what the commissioners could do, but they cannot make a corporation capable of taking contrary to the statute of wills. That colleges are not within the 43d Eliz. and all the cases cited are of poor scholars.

In reply, the counsel for the university rested on the cases they had cited, and principally on *Porter's* case, *Atty Gen.* v. *Bowles.* Burn. Ecc. Law Tit. *Mortmain. Atty.-Gen.* v. *Tindal.* Finch, 245. 2 Vern. *Baliol Coll. Gower* v. *Mainwaring*, 1750. Cases of the *Temple* and *Lincoln's-Inn.* That this use was lawful and meritorious. That the distinction in *Porter's* case between superstitious and charitable uses, established the validity of the latter, though future, and not *in esse* at the death of the testator. That the cases cited prove uses void, where *Cestuy que use* was not *in esse* even before the 43d Eliz. That statute, and the 7 and 8 Wm. III. support such uses if charitable. Duke 62, 81, 83, 84. 2 Vern. 245, 755: and that this court is bound to carry the trusts of Sir George Downing's will into execution, as an executory charitable use or meritorious trust.

After several hearings on this cause the Lord-chancellor Camden, having been assisted by Clarke, master of the rolls, and Sir Eardley Wilmot, lord-chief-justice of the common pleas, his lordship on the 3d July, 1769, declared their unanimous opinion, that "the trust of the "charity in question ought to be carried into execution, "in case his majesty should grant a charter of incorpo- "ration, and license to take the devised premises in "*mortmain*;" and the decree established the will; and the defendants, the heirs-at-law, were to be at liberty to apply to the crown for that purpose. That the freehold estates purchased by the testator after making his will, did not pass by virtue of the codicil; the will not being thereby

thereby republished: and the leases renewed or run out after making the will and before the testator's decease, did not pass by the will, but fell into the residue of his personal estate. That his copyhold estates not surrendered to the use of his will descended to his heir-at-law. That the annuities given by the codicil ought to be satisfied in the first place out of the personal estate, and that the real estate was only charged therewith in case the personal was deficient. And referred it to one of the masters of the court to enquire the annual value of the premises devised to the charity, in order to enable the heirs-at-law to form a judgment what number of fellows and scholars could be maintained by the endowment; and they were to be at liberty to contract for a piece of ground within the University of Cambridge, whereon to found the college conditionally, in case the charter and license should be granted: and it being suggested that certain erections on part of the devised premises were so constructed as to be moveable, referred to the master to inquire the nature of them and state his opinion thereon to the court. And also to inquire into the state of testator's unredeemed mortgages, &c.

Adeemed, Ambl. 571.

Under this decree Lady Downing and her representatives acquiesced for upwards of twelve years, and so well convinced was she of the rectitude of it, that she enrolled it herself. But in March, 1781, a bill of review was filed, though the demurrer thereon was never argued, with intent to appeal to the house of lords.

In 1798, upon a further discussion of the will, it was held that upon a devise to a good charitable use the heir-at-law is not entitled to the rents and profits accrued, before the devise is carried into effect. That the general charitable purpose of the testator shall be executed upon the doctrine of *cy près*, though the particular purpose

2 Ves. jun. 714. Atty. v. Bowyer.

may fail. In the case of Sutton's Hospital, though the corporation was not in existence, the purpose being good, the heir of the bargainor had no interest in the land.*

3 Vez. jun. 300. Atty. v Bowyer. 1800. 3 Vez. jun. 714.

The crown having granted the charter and license for founding *Downing College*, and the university now waving the account against the heir-at-law, who had been substituted as a trustee further back than six years, the Lord chancellor doubting his authority to confine it, made the decree for the appointment of a receiver and for a commission to distinguish the lands purchased since the date of the will from those which passed by it, and which were intermixed with those devised to the charitable use, upon the terms of their procuring an act of parliament to confirm it.

Atty.-Gen. v. Bp. of Chester.

On the same principles, which originally governed this case, the court decided relative to a legacy for establishing episcopacy in America. The late Archbishop Secker gave by will (among other charitable legacies), after the death of the survivor of two relations, which survivor is dead, 1000l. 3 per cents to his trustees, Dr. Stinton (since deceased) and Dr. Porteus, the then Bishop of Chester, to be transferred to the society for the propagation of the gospel in foreign parts, towards *establishing a bishop or bishops in his Majesty's dominions in America*; and ordered "that if any charity to which he had "given legacies should no longer subsist at the time of "his decease, or should have been so grossly abused "and perverted that they should think giving any "thing or so much to it improper; they should give "what he had appointed for it, or such part of that sum "as they should please, to any other charity which they "should

* The jurisdiction of the Court of Chancery upon informations for establishing charities arose since the reign of Elizabeth.

1 Vez. jun. 726

"should approve, whether mentioned by him or not."—And by a subsequent codicil reciting a former, wherein he had by a strange inadvertenee given a legacy towards the augmentation of poor livings in the diocese of Canterbury, in conjunction with Queen Anne's bounty, which was void by the mortmain act, he did now revoke the same, and direct the same legacy to be applied towards *the repairing or rebuilding of houses belonging to poor livings in the same diocese.*

In regard to the last-mentioned legacy, the Attorney-general (Kenyon) insisted, that a gift of money to be laid out in *building upon land* already in *mortmain*, is good in law; and cited for that purpose *Brodie* v. *Duke of Chandos*, and *Atty.-gen.* v. *Hutchinson.** 1 Bro. C. Rep. 444.

Mr. Mansfield, for the Bishop of Chester, did not controvert this, but contended; the selection of objects belonged, since the death of Dr. Stinton, to the bishop of Chester alone. As to the other legacy, there being then no bishop in America, or the least likelihood of there ever being one, *that* he contended was a void legacy, and fell into the residue.

But Thurlow, lord-chancellor, said, the money must remain in court, till it shall be seen whether any such appointment shall take place. The case of *Downing College* was stronger than this; it was to be built at a distant time, and could not be so without the king's license which was long withholden; yet Lord Camden retained the devised estate in the hands of the court. 1785.

With respect to the selection of objects for the other legacy

* 600l. was given by will to be laid out in rebuilding a parsonage house on a living in Hants. Held good, notwithstanding the statute of mortmain. Brodie v. D. of Chandos, before L. Apsley, 1775.

3500l. was given by will to build and endow a school in a particular parish, which parish before had land, and the bequest was held good. Atty.-Gen. v. Hutchinson. Post. 224.

legacy, it must be referred to the master, and proposals of proper objects must be laid before him.

This decision, in May, 1785, was agreeable to the former adjudications already mentioned: where there is a want of specification of particular objects to receive a charitable legacy, the executor must dispose of it under the eye of the court; so here he was directed to propose to the master such poor livings in the diocese of Canterbury, as were objects, to partake of the benefit of the legacy left for repairing or rebuilding their parsonage houses.

As to the other legacy; between the time of the above decree and the final order (made in the cause, for the payment of that and all the other charitable legacies, which was in May, 1786), Dr. Seabury received consecration as Bishop of Connecticut, from the nonjuring bishops in Scotland, with full powers to preach the protestant faith *in partibus infidelium*; and others have since received the same holy office from the hands of the Archbishop of Canterbury. The legacy was bequeathed towards establishing a bishop *in the king's dominions* in America. Dr. Seabury was sent here by the people of Connecticut, who are, with the rest of those colonies, aliened from all allegiance to this crown; and all the *postnati* born there*, since the definitive treaty, are aliens, and disheritable in England.

SECTION

* The converse of Calvin's case, 7 Rep. 1.

SECTION VIII.

Of Devises or Bequests for Erecting and Building.

Erecting and Building.

Erecting and building are often joined, though the former expression is used in a legal sense more as synonimous with *creating* or founding; as where a testator gave "all the rest and residue of his estate of what "nature soever to trustees, in order to and towards erecting a school for the education of poor boys, in such "place, and in such a manner as the trustees should "direct and appoint." It was insisted that this was a lapsed legacy by the *mortmain* act; and that erecting a schoo lmust mean *buying and building*. But Lord-chancellor Hardwicke said, that *erecting* included the *founding*, and consequently the maintenance of the master; which was a different thing from the mere school-place itself; but the end might be obtained by hiring a house, and that for ever; and directed accordingly.

Gastrill v Baker, 1747, cited in 2 Vez. 185.

And a similar determination, grounded on the same principles, was afterwards made in 1751; where Allen, the testator, had devised the residue of his real and personal estate in remainder to trustees, to erect in or near York an *hospital* for the support and maintenance of as many poor old men as the surplus of his estate and effects would admit of, and to put in as many as they should think proper in their discretion: and Lord-chancellor Hardwicke said, The remainder over of the real to the charity is void; which is given up; and, consequently, whenever the death of the devisee for life, without children living at the time of her death, happens, the reversion

2 Vez. 182. Vaughan and Farrer.

in fee will take place in the plaintiff; *(heir-at-law and next-of-kin.)* But as to the residue of the personal, I am of opinion, the charity must be supported; and that it is not contrary to the true intent, meaning, and construction of 9 Geo. II.

As to the point of the mortgage; if that objection was to hold, it would be very fatal. *Atty.-Gen.* v. *Meyricke*, is very different: there was a specific legacy of the whole personal estate, not given by way of residue; and the mortgage particularly by name, which the trustees particularly claimed; and it seems (for I do not enter into the point now) agreeable to that case of papists, who are not capable of taking a mortgage. Here is no part of the personal estate given specifically; nothing but the residue, which will remain after payment of the debts, funeral expences, and legacies; which may exhaust the whole of these mortgages, supposing any such; which does not appear: so that it cannot now be said, that there will be one shilling of the money arising on the mortgage applicable to this charity; *residue* implying nothing specific, only the balance of an account after debts, &c. which is not yet known until administered by the executors, in whom the whole residue vests: or the executors may turn the mortgage into money, and the trustees can pray nothing against them but the balance of an account. The other way of construing this residue would be much too large, and make these bequests so uncertain, that the act of parliament might be as well made, that no personal estate shall be given. The question then comes on the construction of the bequest in general; to which it is objected for the plaintiff, that this residue is given in fact to be applied in purchase of land, or part of it at least, contrary to the statute; that the court would not have made another construction before the statute, and consequently ought not

not now: but I am of opinion, this was not then, nor is now, a necessary construction.

As to the construction of this clause, it comes very near to the case of a school: for a school imports there should be some place in which the children shall be taught; for it cannot mean it should be *sub dio*: So does an *hospital* import some place in which these people should be entertained. There is no direction in this will, that any part of this money should be laid out in *building* an hospital; for *erect* as well imports *foundation* as building: and therefore it was so construed in the case of the school; and so is *erigimus* construed in charters of the crown, and private foundations. It is said, if this case had come before the court before the making this statute, the court would have directed part to be laid out in land and building on it, and part in land for endowment and maintenance thereof; perhaps it would be so; it is therefore inferred, the court cannot make a different construction, to evade the statute: and for that a case was cited *(Mogg* v. *Hodges)*, where the court was not warranted to make an alteration in marshalling assets to evade this statute.

The court cannot lay down a different rule of law or equity in respect of the rights of the parties, to take a case out of the provision of this statute; but that is a very different thing from the manner of executing a charity. The carrying the directions of a will for performance of a charity into execution is different from the other. Now before this statute, it would have been in the pleasure of the court to have directed this money to be laid out in land or personal securities, the funds; and the court did then frequently direct to lay out money, given to a perpetual charity, in the funds, and not in lands, where the will did not direct to be laid out in land; as this does not. Sir J. Jekyl has done it; for he took

it

it to be in the discretion of the court: and the court has done it since in the case of money given or collected in a person's life to a charity; which there is no restraint in this statute from laying out in land: notwithstanding that the court sees this goes so near to the mischief intended to be remedied by the statute, that the court will not direct it to be laid out in land, but in the funds; and I believe on that ground, though by this statute it was lawful to do it, yet as it was contrary to the tenor of it, I varied a direction given by Sir Wm. Fortescue, late master of the rolls.

As therefore this will has not given direction for laying out this in land, before the statute it would be in the power of the court to direct it either way, and since the statute to direct it one way, the funds, the court ought to do so; for there is nothing in this statute prohibiting the giving personal estate to charity, provided it is not to be laid out in land; and the words of the statute are implied to improvident alienations to disherison of heirs. If a large personal estate is left to trustees for a charitable use, which they direct, and there is no occasion to come to a court of equity for direction, there is nothing in this statute restraining the trustees from laying out that in land; because by the express proviso, all purchases to take effect in possession are good, notwithstanding this act of parliament; which is a matter may perhaps want a remedy. If indeed these trustees were to come to this court for an establishment, the court would never direct it to be so laid out in land; but there is nothing illegal disabling the trustees from privately doing it, because the statute makes good all purchases, &c. (to take effect immediately in possession.)

But it is said two purposes are to be answered; one, the *erecting*, the other, the *maintenance* of the persons; and that supposing the court should take it in the latitude

tude it now does, as to the endowment and provision for the poor, that may be answered by putting it out in the funds; yet the hospital cannot be without a building; that land should be bought for it; and the plaintiff ought to have the benefit of so much as the master should think the value. I wish I could come at that, for this plaintiff; who is as much, or more perhaps, an object of charity, than any of these people, who may come into this hospital. It is unfortunate; but yet the court must go according to such rules as will hold in other cases. Suppose this happened before the statute, would it have been of necessity any part of this money should be laid out in land to build an hospital? If the trustees had come before the court and laid a scheme, that a certain person would give a piece of ground to build this upon, it might be done; the court would have accepted it; or if they had said, there were in York several charitable foundations belonging to the city, and they would let them build thereon for this hospital; the court would undoubtedly have accepted it. Nay, they might have said, they would take a house in York for that purpose: *there is nothing in this statute restraining the giving money to build.* It is lawful, notwithstanding, to give money to build a church. Suppose the universities had stood under the same disability as is laid on other charities; money might notwithstanding be given to erect a chapel or hall, or add a building to a college. That is to be executed at once; it locks up no more land; one may give money to add to the buildings of any hospital in London.

Nothing therefore in this statute restrains the testator from doing what he has done with his personal estate: it is a mere surplus of personal estate given to (what the court construed) founding an hospital; in the foundation of

of which the trustees cannot, under direction of this court, lay out in purchase of land, but may by hiring a house in York, or by permission in building on a common piece of ground belonging to the city; which is for the benefit of the city. The act meant to leave persons to dispose of personal estate for a perpetual charity: but meant to prevent the great mischief of giving land for that purpose, or money to be laid out in land; as that would lock up land from being used in a commercial way; which would be a detriment to the public.

The bill was dismissed, but without costs. His lordship observed, that the legal estate is made void by the act, which operates like the popery acts.

Atty.-gen v. Bowles, 1734. 3 Atk. 806. 2 Vezey, 547.

Wm. Bowles, by will in 1745, bequeathed 500l. out of his personal estate, to trustees, to be laid out, part in *erecting* a small school-house, and a little house adjoining for the master; the whole *purchase and building* not to exceed 200l. and the remaining 300l. to be laid out in the *purchase of land*, or in some *real security*, for the *maintenance of the master*.

Lord Hardwicke held, that the word *real*, must be taken in its known legal signification; therefore *that* 300l. legacy was void within the statute. But as to the 200l. if they could get a piece of ground by the gift or generosity of any person, *not by purchase*, they might be at liberty to apply to the court, to lay out *that* 200l. in *erecting* a school-house thereon, when the trustees could lay a proposal before the court; *but not to be laid out in land to build upon:* and the proposal to be given in a certain time.

Thus, money might be bequeathed to build, but not to purchase the ground, which the trustees were authorized by implication to hire; but the principles of these

two

two decisions were afterwards examined by Lord Chancellor *Henley*, in 1764, in the case of *Atty.-gen.* v. *Tindal*, already mentioned; which came before him on appeal from the rolls: I am obliged by the same able friend, whose kindness I have before, and am always desirous of acknowledging, for his notes taken in court at the time.

Atty.-gen. v. Tindal.

Mary Packer, in 1754, devised all her messuages, &c. whereof she was seized in fee, and all her leases, &c. to Jarritt Smith, and others, in trust to sell the same, and with the produce thereof to purchase ground for building and furnishing an alms-house, not exceeding the sum of 1400l. and to lay out the remainder in the purchase of lands; and out of the rents and profits thereof to pay 20 poor persons a weekly allowance; and till such purchase should be made, the money to be placed out at interest; and the dividends to be applied in accumulating the capital. And if her intention as expressed could not take effect by law, then she gave the purchase-money to the trustees, for the same charitable purposes as near as can be; and as the law would admit of:—And gave all the residue of her personal estate, to the trustees to be disposed of to the aforesaid charities.

By the decree in 1759, at the Rolls, the devise of the freehold and leasehold was declared void, and an account of the personal estate directed. The master made his report, and on 24th June, 1761, an order was made, on a hearing for further directions; when it was declared, that if they could obtain a piece of ground by gift, the mere personal legacy would be good: and the debts to be paid out of the leasehold estates, &c. and also the legacies and costs.

From hence an appeal was taken, and the question arose as to the leasehold and personal estate: Whether the

the specific bequest to the trustees, being declared void, it could pass by the residue? This, it was held, would be absurd; as it cannot pass directly when given as leasehold; and inconsistent. See the manner of directing this by the decree.

Where there is no double fund, there can be no marshalling of assets: here it would be making it to be the charity.

Atty.-gen. v. Bowles, was on the same principles; money given to build a school, and to buy land and endow; the money to purchase was void, but the money to build good, if they could get a gift of land within two years.—This would go so far.

His lordship said he could only go according to the house of lords, having no other precedent to guide him: that he was of another opinion, though the person who made that decision (Lord Hardwicke) was as little liable to err as any one. It is laying out money in lands, in the court's sense of it; it is converted into realty; is demandable in a writ of right, and amortizes so much property. It would leave open a door for every ostentatious weak person, who was fond of a name: the object is vanity, is a remnant of popery, which ought to be extinguished where the best religion in the world is exercised.

If the *Atty.-gen.* v. *Bowles*, could be supported; this is much stronger; because the intent is here, that the charity should be entire; she directs (which was not in *Bowles*) the site to be bought with her money: therefore it would be deserting the will to establish an illegal act; by this narrow judgment this act would be like all other *mortmain* acts.

The act is clear, not to give lands for charity; nor to realize money for charity: surely it will, if land worth only 50*l.* become worth 40,000*l.*

As

As to the residue of the personal estate, his lordship held it void; as it appears intended to be laid out in land, &c.

It did not appear to him on what ground this part of the decree was founded: by the will, it appears to be intended to be laid out in land. There can be no doubt, but that if the will had been made before the statute, on a bill it would have been directed to be laid out in land.

In *Sorsby* v. *Hollins*, and *Grimmett* v. *Grimmett*, the devises are disjunctive in lands *or* money, or to the satisfaction of the trustees: but here it is given absolutely to be laid out in lands, and who can alter it? Suppose the money to be laid out in lands, and till a purchase can be made, to be at interest (and not to accumulate for ever, as here); may it not be said, the trustees shall decline to lay it out in land, and so avoid the law? This is not good, for the original intent is to have land: but it would have been good if an election had been originally given of land or money.

The latter clause in the will his Lordship held was void, collusive, and fraudulent; and not to be considered in cases of this kind: it is meant to defeat the act: it intimidates the heir and next of kin from putting the act in execution.

His lordship said, he extremely approved the policy of the act, and extremely disapproved antilegislative charities: it was against reason to defeat whole families. It was his duty to support the spirit of it fairly, without chicanery; he had gone further than any one, and that had not yet been complained of. In *Salisbury* v. *Edwards*, he said, he prevented a contrivance to hinder the heir from contesting the will.

The decree was reversed, except as to costs and accounts,

counts, and the personal estate directed to be distributed among the next of kin.

It was said generally, by the chancellor and the counsel, that assets might be marshalled for a *gross* legacy to a charity, but not for a *residue*: and Lord Hardwicke, in *Atty.-gen.* v. *Greaves* had made that distinction; and declared, *that* case should not be a precedent for a *residue*.

1759. Glub v. Atty.-gen. Amb. 372.

Mundy, rector of Bickton, gave two pecuniary legacies to trustees, to be laid out in building a parsonage-house.

Sir T. Clarke, master of the rolls, held, This is not within the words or meaning of the statute. The statute was meant to prevent new acquisitions in mortmain. Erecting a building is not to be considered as such. Suppose the testator had not made such a devise, he might have been sued for dilapidations, and the money recovered would have been laid out upon the building. This is nothing more.—Decreed the money to be laid out.

1767. Harris v. Parnes. Amb. 651.

So likewise a bequest of 200l. by Dr. *Conings*, to be laid out in repairing the free chapel at Grendon-Court, part of his own estate, was held by Lord chancellor Camden to be not within the words or meaning of the statute: the words are, "to be laid out in the *purchase*, &c." The meaning and intention was, to prevent increase of lands, &c. in mortmain, beyond what was so at the time the act was made. The legacy is only to support that which at the time of the will was in mortmain.

1775. Atty. v. Hyde, Hutchinson, and others. Ambl. 751.

Mary Glover bequeathed 1500l. to be laid out in erecting a free-school at *Royston*, and 2000l. invested at interest, for maintenance of schoolmaster and mistress, and for teaching twelve poor boys and twelve poor girls

to

to read, write, &c. There was a piece of vacant ground at Royston, belonging to the parish, on part of which there was a school-house. It was unnecessary therefore to purchase; and this piece of ground was already in mortmain. Amb. 751. 2 Dick. 518.

Lord Apsley, chancellor, said, This case was new, in respect there is a piece of waste ground belonging to the parish, whereon the school house may be built. Lord Hardwicke's determination, in *Attorney* v. *Bowles*, was certainly over-ruled by Lord Northington in *Attorney* v. *Tyndil*, which latter determination has been followed by several others. Directions in a will to erect a school-house imports an intention to purchase; but where there is land already in mortmain, there is no room for such presumption. Devise of money to repair or build upon land that is already dedicated to the same use, is *not within the statute*; that was the ground of the determination in *Brodie* v. *D. Chandos*. Though it appears there is a vacant piece of ground in the parish, the will does not point at the piece of ground. The will does not say, "to repair or rebuild the school-house now standing on, &c.;" she meant to have a school-house of her own foundation; she had no right to say that the school which is now standing should be henceforward considered as the foundation.—Information dismissed.

Walter Scott, in his will, used these words: "I direct also, that my executors, or the survivor of them, or the executors or administrators of such survivor, do and shall pay, out of some part of my money in the funds, the yearly sum of 200l. for and towards the support of a school at Ross in Herefordshire, at the discretion of my said executors."—And he gave the residue of his personal estate to his executors. Atty.-General v. Jordan. MSS. 27 July, 1791.

Lord-chancellor Thurlow was clear that this bequest was good, as there was no direction for building or hiring

a school. But no decree was made, as the executors proposed to found the school without compulsion.

Cases cited—*Da Costa* v. *De Paz*, Ambler, 228.
Attorney v. *Hyde*, Ibid. 751.
Vaughan v. *Farrer*, 2 Vezey, 182.
Atty. v. *Nash*, before Ld. Thurlow, Ch.

Easter Term, 1792. Atty. v. Nash. 3 Br. 588.

The residue of real and personal estate, left to purchase ground for the purpose of erecting a school-house, (on argument of a demurrer to the information) was declared void.

Catharine Nash, having by her will devised the residue of her real and personal estate in trust for this purpose, gave several directions for the government of the school; and directed and empowered her trustees, out of her real and personal estate, to purchase such spot of ground, within the parish of St. Peter, as they should see proper, for the purpose of erecting said house upon.

The relators, on being advised that so much of the will as directed the purchase of a piece of ground was void by the mortmain act, but that if a spot could be procured, of the description in the will, by other means than purchase out of her estate, they might erect a school thereon; purchased with their own money a proper spot of ground, which they offered to give and appropriate to the charity.

The bill prayed an account, and that the charity might be carried into effect. T. Nash, the testatrix's brother, demurred that the charitable legacies were void in law.

In support of the demurrer, *Vaughan* v. *Farrer*, 2 Vez. 182, et ante 215; *Gastril* v. *Baker*, ante 167 also—If the trustees had been directed to hire a house, it would have been the same as if the testatrix had given a leasehold estate, which would undoubtedly be bad.—

Atty.

Atty. v. *Bowles*, 3 Atk. 806: *Atty.* v. *Tyndal*, 1 Br. 444. n. Amb. 614, et ante 221: *Atty.* v. *Hutchinson*, 1 Br. 444. note, Amb. 751: *Pelham* v. *Anderson*, 1 Br. 444.—Lord Camden thought it impossible to separate the real from the personal. See *Soresby* v. *Hollins*, ante 223: *Atty.* v. *Goulding*, 2 Br. 428.—In *Foy* v. *Foy*, Rolls, 1 Feb. 1785, a gift of 1000l. toward erection, &c. of an hospital for Gloucester, Lord Kenyon directed an enquiry, whether there was any hospital in the county to which it might be applied:—And in *Attorney-general* v. *Bishop of Oxford*, 1 Br. 444, note, he declared he could not vary the use, by ordering a repair, where the testator ordered a building; for, he said, the intention must be implicitly followed, or nothing could be done.

In support of the charity it was urged, that wherever the direction *is only to erect and build*, without any necessity to purchase land, it may be so done as not to be within the statute. None of the cases before the court have been upon the subject of amelioration only of land already procured, but where land must necessarily be purchased; where that is not the case, the statute does not apply. Therefore, in *Harris* v. *Barnes*, money left for repairing a chapel was held not within the statute: the note of that case gives the true sense of the statute, that it was to prevent the increase of lands, &c. in mortmain, beyond what was so at the time the act was made; whereas, where the object of the gift is only the amelioration of land already in mortmain, not an acre more gets into mortmain than was so before.—*Atty.* v. *Bowles*, and *Vaughan* v. *Farrer*, will support this charity; for if a house could be obtained, it would be unnecessary to build one.—*Attorney* v. *Lady Downing*, it was said, that a direction to purchase land, as in *Attorney* v. *Tyndal*, was only if it should be necessary; the testatrix did not

Amb. 651.

Amb. 555.

mean to preclude the trustees accepting a donation of land, which would increase her fund.—*Grimmett* v. *Grimmett*, *Attorney* v. *Hyde*, *Attorney* v. *Goulding*, ; the very import was to bring people together; the principal intention could not take place without a breach of the statute, and therefore that which was consequential only could not take place. As to applying *cy pres*, the cases stand as they did, untouched by the statute of mortmain, as in *White* v. *White*, where the gift was to such lying-in hospital as the testator should appoint, and the testator made no appointment; the court applied the bequest. So in the case of superstitious uses, it was to be applied to a charitable use.

Amb. 210. Ibid, 751.

It was urged in reply, that the principle to be drawn from the cases is, that in every case upon a will, where there is a direction to endow a school or an hospital, and no land already in mortmain is pointed out on which the building is to be, it is void, although the *erection* of the school or hospital be the principal thing in the intention of the testator: and the cases are uniform, where there is a direction to purchase, that the gift is void. In *Foy* v. *Foy*, Mich. 1785, the proposition is laid down, that where the gift is for *erecting and endowing* a school or hospital, there the court implies that a purchase is to be made. In that case the testator gave 1000l. towards the erection and endowment of an hospital in the county of Gloucester: it was not the sole fund, but in aid of a subscription for that purpose; and Lord *Kenyon* (then master of the rolls) referred it to the master to enquire whether there was an hospital. The next clause in the will was, "I give 800l. for "the purpose of erecting and endowing a school." On these two clauses the determinations were different: the

the former was referred to the master, because the testator pointed to the hospital which was then erecting; but as to the latter, his honour declared it void, and said he should have declared the other void also, if there had not been an hospital existing.

The principle is this, that though Lord *Hardwicke*, in *Vaughan* v. *Farrer*, following the case of *Gastril* v. *Baker*, said, if any one give land, the charity should be supported; yet he never meant to say, that a gift to erect and endow simply, was not void. The distinction is, that where the situation is pointed out, and is already in mortmain, the gift is good; where it is not so, it is bad.

Then the question is, whether here the testatrix has pointed to any land already in mortmain. The intention of the statute was to prevent improvident disherisons, as well as to prevent more land from coming into mortmain. If the direction was to hire land for the school, it would be equally void. But in the present case, there is an express direction *to buy land*, even without mentioning it: the court must imply it, for otherwise the executors might wait to all eternity for a person *to give land*. To say that a testator means the execution of the charity should be kept expectant till somebody will give land for the purpose, is impossible. If such a thing can be supposed, it must be a gift within some reasonable time: but here no such thing is pointed out. The case of the *Attorney-general* v. *Hutchinson*, is said to be a stronger case than *Attorney-general* v. *Bowles*, because there was a piece of land; but where the testator does not point out the land, he is not presumed to mean it. It did not occur to any body there to argue, that the having a school was the principal intention, and that it could be car-

ried into execution without a school-house. Would the testatrix have given the charity, unless the purchase and building were to take place? An intention cannot be implied, that she meant it to be built on land to be given by another, or that the executors were at liberty to adopt any piece of land so given. Where a man gives a charity, he means it to be erected at his death, or soon after, not to wait an indefinite length of time for a gift of land. The *Attorney-general* v. the *Bishop of Oxford*, lays it down, that you must execute the testator's whole intention implicitly: Lord *Kenyon*, in that case, would not execute the intention *cy pres*. If the testator were to say, "I give 1000l. to be laid "out in a building, according to an estimate which "amounted to 2000l.:" that would exclude the possibility of laying any part of the money out in land; but if he does not so point it out as to exclude the idea of purchase, it must be implied. But here the intention is pointed out; for in the last clause she empowers and directs the executors to purchase land, and it is the same thing whether the direction is in the first or last clause. What has happened in the *Downing* cause, shews that there is in this country a manner of making lands inalienable for ever; and so there would be as to money, if it was not to be laid out at some determinable time.

Lord *Thurlow*, chancellor, had, during the hearing, thrown out doubts, whether, supposing a certain sum given for the purchase, and another for the endowment, the former being void, would make the latter so likewise. At the close of the argument, he threw out some general ideas on the subject, to the following effect:

Whether the testatrix gave land, or money to be laid out in purchase of land, either would be positively within the

the rules of law, and consequently void; but money given to improve charity lands, is not a laying out in lands, or devising lands. In the case of a legacy of 1000l. *(Foy* v. *Foy)*, there was no application to land; but in the case before Lord *Bathurst*, he thought it must be the intention of the testatrix that the land should flow from her, as well as the other parts of the charity. But it does not strike me that this is a necessary implication. On the terms of the will, I think she did not know the statute, and that she intended part of the fund, if necessary, to be laid out in land. But she meant principally the charity to be executed. She directed therefore the purchase, in order to give it scope; but surely it would not defeat her intention, if the land came *aliunde*. But Lord *Bathurst* thought it equally her intent to give the land from a vain-glorious motive. But if it is to be so construed by the spirit of law, we shall go but a little way if we do not save them by a distinction, that where the principal intent is to effectuate the charity, that intent will be satisfied by the land coming *aliunde*. I cannot conceive that it would disappoint her intention if the whole land came *aliunde*. The question is, whether authority given to executors to lay out the money in land, will bring it within the statute? If land were given, I think it clear the executors could not keep back one shilling of the bequest from the maintenance of the charity.

His lordship, by order 24th May, 1792, allowed the demurrer.

These principles were further considered in a recent case, where *Thos. Davies* bequeathed 5000l. to build twelve alms-houses, to purchase the ground, economy and convenience to be observed in the structure, with directions for the clothing of the objects, and other legacies, with the contingent reversion to the Orphan-school; and the remainder of his property to the Orphan-school provided they would

9 Ves. jun. 535. Atty. v. Davies. 1804.

furnish a piece of ground near the school to build the aforesaid houses upon: and if the Committee should decline the management, then to other trustees, to procure a piece of freehold ground for the purpose of *building* the alms-houses, and *erecting* a school for the education and clothing only of as many children as the finances would bear. But if the Orphan-school committee accept the plan, that they would afford the same medical assistance to the alms-houses as to the schools; and desired his freehold house, in Colebrook-row, Islington, should be included among his other effects to the purposes before mentioned.

The question here was, whether the principal of these dispositions is not void. If the will stopped with the bequest of 5000l. it would be wholly void: for the testator gave it expressly to *purchase* land: and even if he had said nothing about purchasing, a bequest of money to *build* alms-houses would be void according to the later determinations; as the court will not imply an intention of which the will affords no trace, that if the land should be given, then, and then only, the building shall take place; and if the original intention be a purchase, an offer to give will not cure it; for in *Atty.* v. *Nash*, the trustees had purchased land with their own money, and they offered to give that land, yet the court refused to give it effect.

But it was said in this case, that in the subsequent part of the will the testator has relinquished the first intention of purchasing, and has made a provision for erecting alms-houses upon ground to be given by the Committee of the Orphan-school; who, by the information, offer to give this ground; therefore it was said the charity may be executed according to his latter intention, without any violation of the act. In Atty. v. Tyndall, Lord Northington's opinion is express, that to lay out money in building

building upon land that should be given by another person is just as contrary to the spirit of the statute as to purchase land. It is unnecessary, however, in this case, to consider how far that opinion, contrary to Lord *Hardwicke's*, may be well founded; for the provision of this will is not merely that if land shall be given these alms-houses shall be built, but he proposes to the Committee a gift; and offers them the residue as a consideration for their furnishing land for his alms-houses, and taking the management of them and his affairs. He does not mean to give them any part of the residue unless they supply the ground for his alms-houses. He says, I will give your charity money, if you will find land for mine. What is this but laying out money in land? It may be more or less advantageous to them; but still it is a mere bargain: money offered if land is given in return. He meant that they as the Committee, and not as individuals, should furnish the land: and they have the means. But as trustees of the charity they could not make a present of it. He offers only because the bargain was an advantageous one for the charity.

This was held to be more immediately within the statute than *Attv.* v. *Day*, where one of the grounds of refusing to execute the agreement was, that it would be an evasion of the statute, and an indirect method of giving land to a charitable use. 1 Ves. 218.

If the court conceived the statute would be violated even by that sort of bargaining between representatives, because it might be supposed to originate from an intention indicated by the will, offering money as a consideration for putting land in mortmain:—in the one case the statute might with some circuity be evaded; in the other it would be directly infringed; for it is an absurd distinction, that a testator shall not give land to a charity,

but

but he may give money in consideration of another's giving land for a charity.

If it is correct to hold that this was a bequest of a residue to be laid out in land, two consequences will follow :—1st, That such bequest of the residue was void; 2dly, That the bequest for erecting alms-houses was void, because they were to be erected only by what may be considered a purchase of land. It might be, if the whole scheme were carried into effect, that the Orphan-school might have a benefit; for there might be a surplus, and only what is equivalent to the land for the alms-houses were to be applied. But it is impossible to make an apportionment, and to declare the bequest of the residue void for part, and good for the rest. If the principal fails, the subsidiary part must fail along with it. The wish is to connect his alms-houses and their school, and to benefit the latter because of the benefit he expected from that school. It is only on account of their contributing to his plan that he gives to them. This bequest of the residue therefore becomes wholly void.

Chapman v. Brown. 6 Ves. jun. 404.

The relators appealed from the decree pronounced in consequence of this judgment, declaring that the legacy of 5000l. and the residuary bequest were void, and that the residue belonged to the next of kin.

The Lord-chancellor further added, no question can be made; that if the point turns upon the bequest of the 5000l. it is void with every decision. 1st, There is an express direction to purchase; 2dly, Whatever were the decisions formerly, when charity in this court received more than fair consideration, it is now clearly established; and I am glad it has come back to some common sense, that unless the testator distinctly points to some land already in mortmain the court will understand him to mean that an interest in land is to be purchased, and the gift is not good.

This

This testator does not limit his bequest to 5000l. but whatever his property should be at the time of his death, as much as should be wanted for this purpose was to be given to it; and when the residue is said to be 20,000l, no construction is to be put upon this will from the amount of it; that must not have been put upon it if the testator had spent 14,000l. of that sum, or had by a subsequent codicil given more or less to legatees. The amount of the legacy is unascertained, except according to the actual demand of the charity to which it was to be applied, and the casual amount at the death of the testator cannot be a ground of construction, which must be the same as if the residue was only 5000l. and cannot depend upon the accidents. Atty.-gen. v. Parsons. 8 Vez. 186.

I take this school to be a voluntary society, existing purely by voluntary engagements; and then if they happen to have land to be furnished, that is not land at this moment in mortmain in the sense of the statute.* It seems preposterous certainly that a man should give 20,000l. to purchase land worth no more than 5,000l. but the difficulty with reference to that is, that I make the declaration upon the accident that the amount is 20,000l. whereas the construction ought to be the same as if he had spent 15,000l. of that sum. But supposing there might possibly be a surplus beyond what was necessary for the purposes to be accomplished in these alms-houses, yet upon this will it is altogether uncertain, whether there would or would not be any residue beyond what was to be employed in the alms-houses, and if what is given is to be employed in buildings contrary to the act, all the cases are uniform; that if the minister is to be employed

* In the course of the argument a doubt was suggested, whether the committee of this charity had any land in mortmain, and it was said the charity was supported by voluntary contributions, not by any permanent endowment.

employed in the chapel, or the poor persons are to live in the alms-houses to be built contrary to the act, that which would have been good if it had stood alone, will be bad if the purpose is to be employed in those buildings which the statute will not allow to be erected.

Upon the whole will, this would be in whatever terms expressed, whether of condition or not, only a declaration of the trust upon which they are to take, if they do take. By the direction for management the orphan committee are out of that residue, comprehending more if necessary than 5,000l. or less certainly, if less would be sufficient, to do the acts pointed out; among which, is to afford the same medical assistance to the alms-houses as to the school; and he recommends them, which would be imperative upon them, to establish a chaplain.

Malim v. Keighley. 2 Vez. 333, 529.

It is a bequest of a residue to be laid out, in the first instance, in land; and if all should not be exhausted, as it could not be consistently with his scheme, to be laid out upon these purposes affording medical assistance, and for a chaplain in the alms-houses; and all beyond that, if well given, is uncertainly given; and if the primary gift fails, the secondary gift being totally uncertain and fluctuating from time to time, the whole must fail.

Chapman v. Brown. 6 Vezey, 404.

On the other ground there is as much vanity as charity in this. He did not choose this monument to be erected to his memory, unless he should be considered benefactor of the school as well as the hospital. He meant, if the orphan committee could take the management of the alms-houses, then so much should be for the school; but if they could not, then the trustees substituted could build the alms-houses and school also. But if it cannot be distinguished how much was for the alms-houses, and how much for the school, it is very difficult to divide it and make it good for part, and not for the rest. Upon the whole, therefore, the decree was affirmed.

SECTION

SECTION IX.

Of Misnaming, Uncertainty, and Want of Objects.

Misnaming, Uncertainty, and Want of Objects.

Notwithstanding the ancient rule, that uncertainty makes void the grant, yet the misnaming and uncertainty of expression, in a bequest to a charity, has been always guarded by the legislature and by the court, as may appear by the statute 14 Eliz. c. 14 and by the following decisions. But it may be proper to observe here, that the usual course of application to the court to establish charities, is by bill of information in the name of the *Attorney-general*; and though there should be any mistake in the circumstance of laying it, yet if it appears there is a charity, and the right appears in the whole cause, that information cannot be dismissed, but a decree must be made to establish that charity. This doctrine had been frequently laid down, and allowed; because it is considered as a proceeding by an officer of the crown; and as the king is *pater patriæ*, the information therefore must not be dismissed: so that although the relator has mistaken his title, yet if in the cause a title comes out for him and his successors, he must have that title established.

Finch, of Law, 49.

2 Vezey, 426.

This is the doctrine maintained by the Court of Chancery in all charity cases; but it will be found to go much further than this; for in all cases of uncertainty, and even of want of objects, either from there not being found any to take the benefit of the intended bounty, or where there have been objects, and they are all satisfied

or

or gone, the court will still preserve the gift for charitable purposes, *cy pres*, as near as possible to the donor's intention:—for what has once vested in charity, never reverts to the donor or his heirs, but will be disposed of by the king, by his sign manual, or by the court, according to a scheme to be submitted to the master's investigation for some other charity. And where devises have been held to be void on account of misnaming a charity, they have been maintained as appointments in equity, under 43 Eliz. c. 4.

Finch, 221. Atty. v. Plat. Atty. v. Andrews, ante 147.

The following case arose some years before the date of this act, on perhaps the most extraordinary will that ever appeared in the legal annals of this kingdom.

Richard Norton, of Southwick, in Hampshire, esq. died in 1732, leaving a will dated in June, 1714, (and several codicils and testamentary schedules), wherein after his debts, &c. should be punctually discharged, he devised all his real and personal estates whatsoever in the county of Southampton, with every thing that he did hold, possess, or enjoy, or in any manner whatsoever it be belonging to the same real and personal estates, to the poor, hungry and thirsty, naked and strangers, sick and wounded, and prisoners, and to and for no other use whatsoever; and did thereby make, constitute, and appoint the poor abovesaid to be his general and absolute heir and heirs to the end of the world. And he says, "I do presume to make, constitute, and appoint, all and "every person and persons, that do, shall, or may "make or compose, or are to be the supreme legislature "of Great Britain in parliament assembled, to be my "executors.—And if I have presumed too high, and it "be refused, then I beseech the archbishops, together "with the bishops of Great Britain or of England, for "the time being, and their successors, to be my exe-"cutors:" any five of them, whereof the archbishop of Canterbury

Canterbury to be one, by any writing under their hands to act, order, do, and fully perform and execute my true meaning and intent therein before declared, to the end of the world: "And I do most humbly beg of them "all to be zealous advocates for the poor as aforesaid, to "the legislature of Great Britain: and if, at the time of "my death, the supreme legislature should not be sitting, "then that any five of them the said bishops, &c. whereof "the said archbishop to be one, would immediately be "pleased to take care provisionally of all matters therein "contained, and do all acts until the next parliament "shall meet and be held."

The consideration of so extraordinary a will necessarily came under the investigation and care of the legislature; and to the end that its validity, as far as it related to his personal estate, might be examined and determined in the ecclesiastical court, and that fit persons might be appointed to institute, prosecute, and defend all suits concerning the same, as far as the same relate to his personal estate, a private act was passed, empowering three persons named in the act, to sue for administration, with power to the ecclesiastical court to appoint others in case of death: and it was declared that the act should not give greater force to the said will, than it had before. 6 Geo. II. c. 32.

And in 1737, three years after the last *mortmain* act, another act was passed, to prevent the statute of limitations (21 Ja. I.) from being pleaded by any persons claiming under this will, against any title which Thomas Norton, esq. had to the manor of *Old Alresford*, in Southampton, by indenture of settlement, or the rents or profits thereof. 10 Geo. II. c. 37.

I have not been able to learn what steps have since been taken, or how the estates are applied; but it has been already shewn, that bequests to the poor *indefinitely*, means

means all the poor of England, and vests the distribution in the discretion of the crown.

Atty. v Hall, MSS. Testator gave all his money to his son, and at his son's death, he gave what he the son should die possessed of to a charity. Information was brought at the son's death to have this legacy, but held by Lord-chancellor King, assisted by Sir Joseph Jekyll, master of the rolls, and Lord-chief-baron Reynolds, that this was not a good legacy to the charity, the son not being restrained from doing what he would with the money; and therefore it amounted to a wish only.

Swinb. p.7 s.8. A testator bequeathed 100l. "*to the church*," not mentioning what church; it was held, that it should be understood of his *parish church*; or if he name a church, and there be several of the same name, and none of them his parish church; the executor, if he prove the will, or the ordinary, if he refuseth, may bestow the legacy on which church he pleases; but if the testator's parish church be of the same name, it ought then to be bestowed there.

Finch, 222. Atty.-gen. v. Platt. The court of Chancery will not suffer any agreement between the heir and the charity to alter the donor's design; and will decree the charity generally as near as can be to the intent of the donor; and therefore, if the gift is of money to the parish of B generally, it shall be decreed to the poor; if he had given it to the *poor of the parish* indefinitely, this would, according to the civil law, be to the poor of the place or parish where he lived, if there was no hospital there; but if there was, then to the poor of that hospital; and the court of Chancery concurred in so decreeing it. But a legacy *to the poor* indefinitely, was afterwards said to include all *the poor of England*; and therefore was vested in the crown, who disposed of it to Christ's hospital and others.

2 Dom. Civil Law, 169.

Finch, 245. Atty.-gen. v. Peacock.

It was said the civil-law would have maintained this devise

devise for any hospital where the testator lived; and if there were no hospital there, then for the poor of his parish.

Again; If the gift is for the poor of any city, and other parishes are afterwards admitted within the precincts of the city, and added thereto; the poor of the parishes admitted shall have a proportion of the charity: and where the bequest was generally to a parish, without any directions as to the particular use, it was decreed to be applied to the poor of that parish. Finch, 194. Atty v. Corp. Rochester. West v. Knight. 1 Ca. Cha. 134.

On the same principle the court decreed in *Masters* v. *Masters*, that where a legacy of 5l. was bequeathed to the poor of two hospitals in Canterbury, naming them, and by a codicil an annuity of 5l. *to all and every the hospitals*; it appearing that the testatrix lived at Canterbury for many years, and died there; and that she had taken notice by her will of two Canterbury hospitals; this charity was held not to be void for its incertainty, but to have been intended for *all the hospitals* in Canterbury; but not to extend, as was pressed, to the hospital about a mile out of Canterbury, though founded by the same archbishop, and governed by the same statutes. And this the court decreed, notwithstanding it was objected, that they ought not to go out of the words of the will, and confine the general words "all hospitals," to those in Canterbury; and the court did this the rather, because these charities if they prevailed would be perpetuities of 5l. per annum, and by that means create a deficiency, and consequently in a great part defeat the rest of the will as to plain legacies, in favour of those that were doubtful. 1 P. Wms. 423.

It is, however, to be remarked, that this decision was some years previous to the late *mortmain* act, and the annuities granted were charged on the testatrix's lands, which could not be at this day; but the principles of the

decision as to the expression of incertainty whether all or what hospitals were meant, remain still the same.

1 P.Wms. 674. Atty.v.Hudson. 1720.

Thus also one Penning, of Saffron-Walden, in Essex, and several others, subscribed to a charity-school there, of 12 boys and girls, which subscription was only during the pleasure of the benefactors. Penning, delighted with seeing these charity children, declared he would leave them something at his death: there was also a free-school in the same town; and Penning made his will giving "500l. *to the charity-school*," and several pecuniary legacies to his poor relations, and died. The executors insisted on the want of assets. Lord Chancellor *Parker* said, that though the free-school be a *charity-school*, yet the charity-school for boys and girls went more commonly by that name; and as the testator was fond of the *latter*, and declared he would leave them a legacy, therefore *that*, and not the free-school, was intitled thereto; and ordered the legacy to be brought into court with interest from the end of the year after the testator's death: and in case of a deficiency of assets, that all the pecuniary legacies, as well that to the charity as others, should abate in proportion; for though the Romans preferred a pious or charitable legacy to others, yet our law does not: they being all but legacies, and equally intended by the testator to be paid, it would be hard that one of them, by being preferred, should frustrate all the rest; besides the other legacies being to several of the testator's *poor relations, they are charities* also *. And because it was objected, that on the failing of the charity-school,

Ante. 61. 1 Vern. 230. 2 P. Wms. 25. 1 P.Wms. 428.

* But where a testator, among other bequests to charities, gave 3l. a piece to the poor of three several parishes, the court looked upom them as part of the funeral, and as *doles* at the funeral, and therefore held that no abatement ought to be made out of them. Attorney-gen v. Robins. 2 P. Wms. 25v

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the charity ought to revert to the founder, therefore in such case his lordship gave liberty to the parties to apply again to the court.

The same principle is evident in the decision on a much earlier case of Caroon-house, at Lambeth.

Atty.-gen. v. Wichcott. Finch, 352. 1678.

Noel Lord Caroon, formerly ambassador here from the States-general, being seized in fee of a great house in Lambeth, called Caroon-house, and the lands thereto belonging, called the *Park*, and having built an *alms-house* in that parish; wherein he placed *seven poor women of Lambeth, of sixty years of age* and upwards, whilst he lived, and appointed 4l. to be yearly paid to them quarterly; and, to establish the same as a *perpetual charity*, did by his will *charge the premises* with 28l. per annum, to be distributed equally to *seven poor women*; and directed that when one or more of them died, their places should be supplied, at the appoinment of the owners of *Caroon-house*, by *other poor women*, which, as it was suggested, he intended should be *poor women* of *that parish*; which was always done by himself as long as he lived: and it appeared, that the owners of Caroon-house had for some time paid the charity, but of late had refused, so that it became in arrear, neither did they fill up the vacant places, pretending that the charity was not payable in *succession*, there being no such direction in the will of the donor, but only to *seven* poor women who were in possession at his death; or that if it must be paid, yet it might be to other poor women out of any other parish at their own appointment.

Therefore this bill was brought against the owners of Caroon-house, to have the charity established for ever, and the arrears thereof paid by the defendants, and the growing payments duly made for the time to come, and the poor women to be chosen in *succession out of Lambeth*

only, and not out of any other parish: for otherwise the charity would rather be a prejudice than a kindness to Lambeth; because if taken out of other parishes, Lambeth must maintain them, the 4l. per annum being not sufficient to maintain a poor woman of *sixty years old.* It was decreed as prayed, and thus a charity was established in the hands of the church-wardens *in succession,* though not given so in direct words*.

Finch, 395. Owen v. Bean. A bequest of money to be distributed every year on certain days to the poor of the parish of L. in the county of M. and there was no such parish in M. but there was in the county of D; the court established the will, because it appeared that he was born there, and that both he and his parents lived and died there.

2 Atk 239. Baylis v. Atty.-gen. 1741. A legacy bequeathed to "the ward of Bread-street," was so uncertain as to require material attention, and the court decreed it to be given to such charities as the alderman and inhabitants of that ward should think fit. The court would probably, at this day, have avoided that discretion, and given it in the first instance to the established ward-school.

Atty. v. Rigby. 1732. 3 P. W. 145. The grant of a rent-charge to a charity towards the support of several poor old men, with remainder over to J. S. in fee, was held by Lord-chancellor *King* (before the statute) to vest the right of nomination of these persons in the heir of the grantor, it being incident to the founder and his heirs, or to those whom he should appoint. When the lands were granted away, the rent-charge, a thing independent and collateral, did not pass therewith like a rent-service, which is incident to the reversion; whereas this being a rent-charge, and in fee, had no

* Though this devise would be void if made since the late act, yet it is here cited to shew the uniform practice of the court in such cases, of rectifying general or doubtful expressions in wills.

reversion.

reversion. But for as much as the grantees and owners of the land had for upwards of 60 years enjoyed the nomination of the persons who had partaken of the charity, the court allowed all those payments.

But, although the founder and his heirs have a right to the nomination, yet they forfeit it by a corrupt and improper nomination of such as are not fit objects of the charity, or by making no nomination at all. But this neglect of nomination must be after such time as the founder have had notice of the vacancy; and without proof of such notice, it is no fault.—By Lord-chancellor *Parker.* Atty. v. Leigh, 1721. 3 P.W. 146.

The nomination had been always held conformably with this doctrine, which is, that when money is given to a charity, without expressing *what* charity, there the king is the disposer of it; and a bill ought to be preferred in the Attorney-general's name for that purpose. But if the charity be expressed, there it is in the power of the commissioners under 43 Eliz. c. 4. for charitable uses.—*Clifford* v. *Francis.* 1Freeman, 330. 1679.

So if a sum be bequeathed for such charitable uses as should be defined by a codicil or note in writing, and no such paper be found, the court of Chancery has the power of disposition as it shall think fit: but if the will points at any particular charity, as for maintenance of a school-master or poor widows, there the court will not direct it to any other purposes but such as are within that description, and will receive applications so as to determine on the proper objects. Or if the devise were to such a school as the testator should name, and he did not name any, the court may then apply it to such school as it should think proper; but for no other purpose than a school. 2Freeman, 262. 1702.

The power of appointing the master to an hospital being vested in the queen consort, does not abate by her

becoming *queen dowager*, if the former did not direct it otherwise in such a case: where the power is general, it remains for life, and the law will not allow in construction such a desultory kind of inheritance: besides, she remains a queen after the demise of the king, and has always her privilege allowed her in the Exchequer.

Skin. 15. 33 Car. 2. B. R.

A *lay*-hospital was held not to be grantable in reversion.—*Brownker* v. *Atkyns*.

Doyley v. Doyley. Atty. v. Doyley. 1735. Reg. Lib. A. 2 Ves jun. 58.

Timothy Wilson, by will dated 1714, devised his real and personal estate, in trust, after certain limitations in remainder over to such of his relations, of his mother's side, who were most deserving, and in such manner and proportions as they should think fit, to such charitable uses as they should think most proper and convenient.

The court established this charity, and decreed the net surplus to be divided in moieties: one whereof to be distributed equally among all the relations of the testator, on the mother's side, within the degree of third cousins, and born at the death of his widow, and still living. And as to the other moiety, all parties were to propose schemes before the master for distributing the same out and out in charity; and herein the several poor relations of the testator, not partakers of the other moiety, were, *ceteris paribus*, to be preferred, &c.

By the report, 42 relations were to receive 56l. each for one moiety; and for the other, 400l. to eight poor relations; the like sum to the Westminster Infirmary; and other sums to other public charitable institutions; and, among others, to the parishes in the town of *Guildford*.

This case is held as an authority for a scheme upon a general bequest, not a disposition by the crown. One of the trustees had released—the disposition here fell upon the court.

G. Cranstown

G. Cranstown bequeathed bank annuities to the *poor inhabitants* of St. Leonard, Shoreditch. 1762. Atty. v. Clarke. Ambl. 422.

Sir Thomas Clarke, master of the rolls, said, The court forms a judgment, upon taking all the circumstances into consideration, and inclines in favour of the disposition, *ut res magis valeat.* In *Atty.* v. *Rance*, July, 1728, a legacy was given *to the poor.* There were no words in the will which discovered what poor he meant; but it appearing that the testator was a French refugee, the court directed the legacy to be given to poor refugees.—In *Atty.* v. *Browne*, in 1749, the words were very general.

The words in the present case are not so uncertain as in those cited. The word *inhabitant* bears a very general sense, and may extend to every body living in the parish. But, as it could not be intended that the poor inhabitants which are relieved by the parish should have benefit by this legacy, which in effect would be giving to the rich, and not to the poor, he declared, that the distribution of the legacies was to be confined to the poor inhabitants of the parish of St. Leonard, Shoreditch, not receiving alms; and ordered a scheme to be laid before the master for such distribution.

Edward Koss, by a codicil, gave the residue of his personal estate, in trust, for the augmentation of the charitable collections for poor dissenting ministers of the gospel in any counties of England, to be paid to the treasurers of such charitable societies, or fund, as the majort part of the trustees should appoint. 1765. Waller v. Childs. Ambl. 524.

The executors, by their answer, stated, that the protestant dissenters in this kingdom are distinguished by the several denominations of *presbyterians*, *independents*, and *baptists:* and that the dissenters of each of those denominations, living and residing in and near *London* and *Westminster*, have a separate society, consisting of

persons chosen out of their respective congregations, which society is called by the name of "The Managers of the Fund for the Support of Poor Dissenting Ministers of that denomination in the country:" and that there are charitable collections annually made at the said meeting-houses, belonging to most of the several congregations belonging to each of the denominations, in and about the cities of London and Westminster; and the money given at such collections is constantly and regularly carried to the said fund, and paid into the hands of the treasurer thereof for the time being; and that the same is disposed of by the said managers of such funds, for and towards the support of Poor Dissenting Ministers in the country, whose annual subscriptions from their own congregations are so small as not to be sufficient, in many cases, to support themselves and families with the common necessaries of life; and also, for the relief of any extraordinary necessitous cases of such poor ministers and their families as may occasionally occur: and they have each a treasurer, who takes minutes of their proceedings at their several meetings, which are fairly entered in books kept for that purpose, as also the accounts of the disposition of the said charity.

On hearing the case upon the Master's report, a question was made, Whether the charity bequests were not void, for *uncertainty* in the description? But the court was clearly of opinion, without hearing the counsel for the charity, that the bequests were good upon the words of the will, and upon the evidence which was read in support of the answer; and that they were intended for all the ministry in general; and ordered the money to be paid to all the treasurers of the three denominations, upon the trusts of the codicil.

A question was made by the court, Whether they could *marshal the assets* in favour of the residuary bequests,

by

by directing the leaseholds to be applied in the first place in payment of debts and legacies, in order to leave the rest of the personal for the benefit of the charity. But it was given up on the part of the charity, upon the authority of the *Attorney-general* v. *Tyndal.* — *Atty.* v. *Caldwell*, cont.

A devise generally of lands in trust to be sold or mortgaged, to pay debts, &c. and the overplus money and rents of the messuages remaining unsold, to be applied to charitable and pious uses.

1772. Atty.-gen. v. Wm. Herrick and others. Amb. 712.

Lord-chancellor Bathurst said, "I was inclined in favour of the heir; but the authorities are too many and too strong to contend with." *Coke* v. *Dukenfield*, 2 Atk. 562-5; *Atty.* v. ——, 1743. From Lord Hardwicke's note-book: "There being no particular charity, his majesty may dispose of the 400l. to such charity as he shall think fit."

De Costa v. *De Pas*, from the same note-book: "I held donation in this case to be a charity devise; and the use being against the policy of the law, the disposition was in the crown; and I recommend it to Mr. Attorney-general to apply to the crown for a sign-manual."

Atty. v. *Peacock*, 27 Car. 2. from Lord Nottingham's notes:—"Although the charity be uncertain to what poor it shall be applied, his majesty may dispose of it." —His lordship afterwards, on a second hearing, 28 Car. 2. said, "No objection to the uncertainty of the object, for the king may appoint."

Lord-chancellor Bathurst concluded, that he would apply to his majesty for his sign-manual, as Lord Nottingham did in *Atty.* v. *Peacock*.

Devise in remainder to a body corporate in trust for the testator's nephews and nieces, and their child or children, &c.

Souley v. Clockmakers' Company. 2 Br. Cha. Rep. 81.

The court decreed these uses not defeated by the deficiency

ficiency of the trustees, but that the heir-at-law took as trustee for the uses of the will; for although the devise to the corporation is void at law, yet the trust is sufficiently *created* to fasten itself on any estate the law may raise. This is the ground whereon the courts of equity have decreed in cases where no trustee is named.

1 Dickens, 168. Atty. v. Berryman, 1755.

It does not unfrequently occur, that testators bequeath charity legacies to be disposed of at the discretion of their trustees or executors, in all which cases if the executors or trustees do not exercise that discretion, the charity is not lost thereby but falls to the crown; and the king's sign-manual is applied for by the Attorney-general to dispose of the benefaction according to a scheme to be approved of by him.

See also Atty. v. Syderfen. 1 Vern. 224. Clifford v. Francis. 1 Freeman, 330. Kely, 34. Atty. v. Hickman. 5 G. 2.

But in case of the death of trustees for a charity, in the testator's life-time, the charity subsists in equity, though by law it may be deemed to have lapsed.

Easter Term, 1792. Moggridge v. Thackwell, and others. 3 Br. 517.

This point having been very ably considered in a recent case, it scarcely needs an apology for stating it at length, the charity was sustained by the court. Mrs. *Ann Cam*, of Battersea, gave the residue to *James Vaston*, his executors and administrators, desiring him to dispose of the same in such charities as he should think fit, recommending poor clergymen who had large families and good characters, and appointed him and the plaintiff executors. *Vaston* died in her life-time, of which she had notice; whereupon the next of kin claimed the residue.

It was insisted, that there being a general intention to give to charitable purposes, the gift itself was not void, but the appointment had devolved upon the crown, or upon the court: as in *Atty.* v. *Syderfen*, 1 Vern. 224. referring to a writing specifying charities, but not found; and *Frier* v. *Peacock*, "a gift for the good of poor people for ever: *Atty.* v. *Hickman*, 2 Eq. Cas. Abr. 193; in *White* v. *White*,

White, " to such lying-in hospital as the executor should appoint," and afterwards struck out the executor's name: in *Doyley* v. *Atty.* 2 Viner, 485, Plea 16: in *Widmore* v. *Woodroffe*, 1 Bro. Rep. 18, n. Amb 639, " to some public charity." In all these cases the charities left were established.

It was contended, on the other side, that the cases in the books differ from the circumstances of this case.—Held the testatrix did not give the legacy to any particular charitable purpose, but left it to the executor personally to make the appointment. Then she must have it in contemplation that he must survive her, or die in her life-time; and although he dies in her life-time, and she have notice of it (viz. nine years before her death), she still leaves the power of appointment personally in him, who she knew could not execute it; therefore it does not appear that she died with the intention that it should be so distributed. The gift of the power lapses by his death, as much as an estate given to him would have done; because it has become impossible he should appoint, and she did not mean the confidence to go to his representatives.

In Syderfen's case there was no evidence that the testator had destroyed the writing; that would have been a revocation. In Hickman's case, the objects were defined, though the trustees were dead. In Doyley's case, the court held the new trustee to be within the directions of the will. In the present case, there is no designation of any charity; it is to Vaston, to such charities as he should think fit: so that the first question is, Whether there is any trust at all? for although a recommendation will raise a trust, it will only do so where the subject to be applied is certain, and the object to which it is to be applied is certain also. And relied on *Harding* v. *Glyn*, 1 Atk. 469: *D. Marlborough* v. *Lord Godolphin*, 2 Vez. 61;

61 : *Atty* v. *Glegg*, Amb. 584 : *Hibbard* v. *Lambe*, Amb. 309. Held that only the surviving executor could appoint; so that, had he been dead, the whole must have failed. In *Brown* v. *Yeall*, the residue was to be applied "to the purchasing of such books as, disposed of under the following direction, might have a tendency to promote the interests of virtue and religion, and the happiness of mankind;" and then directed this charitable design to be executed under the direction of such persons, and under such rules, as by any decree of the court of chancery should be directed. Lord chancellor *Thurlow*, held this gift to be void for uncertainty. That if the case were not so clear, then it would bear some reasoning: it is a gift of the "residue to *Vaston*, desiring him to dispose of it in such charity as he should think fit, recommending poor clergymen who have large families and good characters." There has been some argument upon the effect of these words, and whether they are precatory or jussory; but it is perfectly clear that *Vaston* could not claim this property for his own use. All the rules, both of the civil or common law, would repel him from taking the property in that way. He could take it only for the purpose of charity. Then he must be a trustee: it is the same as if she had given it to a certain charity, naming him as a trustee. Then the circumstance of his being dead in the life-time of the testatrix, or the length of time that he had been so dead, cannot govern the effect of the will; if it could, there might be a total end to dispositions by will. This reduces it to the common case of the death of a trustee, which cannot defeat the effect of a legacy. Then can I say, that this legacy is not sufficiently distinct to bind the property? The most general gift to charitable purposes has been decreed to be carried into execution; and the trustee's not being alive to administer the charity, cannot defeat the intention.

1 Atk. 356. Atty. v. Glegg.

Here

Here she has pointed out clergymen as the objects of bounty, which is sufficiently distinct; but it must be referred to the master, to whom a scheme must be proposed for the execution of the charity.

Upon a rehearing of this cause before Lord Eldon, chancellor, it was contended, that the case stood very much independent of all the authorities, upon its own circumstances, and the terms of the residuary clause, and the whole frame of the will. This was not the simple case of a general indefinite trust for charity without any object specified by the testatrix, but a personal confidence confined to *Vaston* that could not be transferred to any other person, and which the court could not possibly execute. The question then was, whether in the event that had happened there was a lapse for the next of kin, or whether it devolved to the crown as the general guardian of all charities: it is an admitted fact that she knew of *Vaston's* death. She had given specifically to all the charities for which she had any respect; as to the residue no charity could take, except by the act and under the authority of *Vaston*; upon the whole will there was a personal confidence in him alone. If she had given the fund over in case he did not make a disposition, or if he should die in her life-time, to an object to which it could not be applied, or if he had shewn an intention to execute, though illegally, it must have gone to the next of kin, not to any general charitable purpose. 7 Vez. jun. 36. Moggridge v. Thackwell. 1802.

It is true, as Lord *Thurlow* said, the death of the trustee cannot affect the intention; that, however, is where it is clear what the trustee was to do; but where it is of so discretionary a nature, that his act is absolutely necessary to create the trust, his death puts an end to the disposition, &c. &c. The only question of reasonable doubt was, whether the disposition was to be in the court by a scheme, or by the crown at once without that form.

form. Very little was to be found on this point; and it was difficult to ascertain precisely the ground of distinction. From all the early cases, it is clear that where the bequest is indefinite and uncertain in its object, a general bequest for charity, it would be for the crown to dispose of it; so where it is clearly a disposition to charity, but to be carried into execution in a way the law will not allow, as in *De Costa* v. *De Pas*, there also the disposition is in the crown; upon the principle, that the distinct object failing nothing remains but the general object of charity. The distinction seems to be, that where the party has pointed out any particular object, defined in any degree, there it is not looked on as being in the disposition of the crown; which might overlook the intention completely, and appoint arbitrarily. So where the object is legal but from circumstances, it is impossible that it can be executed, there the court takes it with the same view; to carry it into effect upon some scheme as nearly as possible to that intended, as *Att.* v. *Lord Mayor*, &c. not leaving it quite at large.

Where a trustee is appointed the court will put themselves in the place of the trustee; and there is more reason for that from the nature of the charity.

It was contended for the charity, that the court acknowledged a disposition to charity as a substantive disposition in some mode or other against the next of kin. If the primary intent was the disposition by *Vaston*, that would have been better secured by giving the fund to him. If charity is the *cestuy que trust*, why was the death of the trustee to defeat that trust more than any other? In the case of *Downing College*, upon which a very elaborate argument was given by Lord *C. J. Wilmot*, a complete part of that argument was upon this very question, How far the death of the trustee can disappoint the *cestuy que trust*. He said the legal estate followed the

Amb. 550, 571.

trust;

trust; that there is an essential difference between powers and trusts; if the trustees will not, or cannot act, the constitution has provided a trustee; the king, as *parens patriæ*, has the superintending power over all charities abstracted from the statute of 43 Eliz. and antecedent to it, (2 P. W. 119.) and that paternal care and protection is delegated to this court. Where no trustee is appointed, this court assumes the office in the first instance. His lordship also considers there, whether the primary object of execution by a particular person shall prevent the general object; and the question, whether, if the trust is illegal or void, or not fit to be executed by a Court of Equity, this court will execute it as far as the rules of law and equity will admit.

He says this court has long made a distinction between superstitious uses and mistaken charitable uses; property destined to the former is given by act of parliament (1 Edw. VI. c. 14.) to the king, to do what he pleases with, and properly falls under the cognizance of a Court of Revenue. The reason of the distinction is, that in the latter case the donation is considered as proceeding from a general principle of piety in the testator; and this court carries on that general intention.

Upon the other point, the disposition is in the crown, not in this court; and *Atty.* v. *Matthews*, 2 Lev. 167. was relied on.

In reply it was said, that none of the cases have such words as this will; importing not a trust, but a personal confidence, that a charity created by this individual, and such charity only, should take; and if there should not be any such, then it is to be considered as if the residuary legatee had died in the life-time of the testatrix, &c. &c.

Lord-chancellor *Eldon*, *int. al.* directed the costs out of the fund as between Attorney and Client, and then delivered

delivered the following adjudication.* In what the doctrine originated, whether, as supposed by Lord *Thurlow* in *White* v. *White*, in the principles of the civil law, as applied to charities, or in the religious notions entertained formerly in this country, I know not; but we all know there was a period, when in this country a portion of the residue of every man's estate was applied to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator. When the statute compelled a distribution, it is not impossible that the same favour should have been extended to charity in the construction of wills, by their own force purporting to authorise such a distribution, I have no doubt that cases much older than those I shall cite may be found; all of which appear to prove, that if the testator has manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated, shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention, as to the mode, cannot be accomplished.

1 Bro. C.C. 12.

22 Car. 2. c.10.
29 Car. 2. c. 3.

One of the earliest cases mentioned in the *Atty.* v. *Syderfen* is *Frier* v. *Peacock*. According to that case, the generality of the gift made the effectuating it impracticable; and for that reason, the substance of the gift being to assist the poor, the court substituted a practicable mode of assisting the poor, and reduced the number of legatees, whom that general term would embrace to forty poor boys. That case is more fully stated in *Levinz*, under the name of the *Atty.-gen.* v. *Matthews*,

1 Vern. 224.
Finch, 245.

2 Lev. 167.

* I have taken the liberty to insert this at large, because it comprehends an elaborate examination of all the preceding cases.

where

where the decision is thus stated, "and this decree of "the commissioners was now quashed by the lord-"keeper, *Finch*, because this being a general charity, "and for the poor in general, the commissioners have "nothing to do with it; but it is to be determined by "the king himself in this court, upon an information by "the Attorney-general, in behalf of the King, which "accordingly he directed to be brought. And now upon "the information, the Lord-keeper said, this gene-"ral charity belongs to the king himself to dispose, but "yet to the poor, and therefore the disposal of 80l. per "annum to Paul's was out of the trust and void, and "the distribution to the three parishes good, and "to be confirmed. But as to the poor kindred of "Frier, who prayed to be considered, no consideration, "he said, could be had of them, for the disposition must "be such as may endure for ever, and they cannot live "poor for ever. But before he would dispose of the "residue, he said, he would acquaint the king with the "case and the value of the estate, which appeared to be "400l. per annum at least, to have his directions how "the disposition of this general charity should be, and "that to be confirmed by the decree of this court. And "afterwards the king directed it should go to the main-"tenance of the mathematical scholars in Christ's Hos-"pital, whom the king had lately appointed to be brought "up there, in order to be instructed in the art of navi-"gation, which, *ut audivi*, was accordingly confirmed "by the decree of this court."

The authority of this case is strongly confirmed in the *Atty-gen.* v. *Syderfen*; and upon inquiry at Christ's Hospital, I have been furnished with the original papers in that cause, which give an answer to the objection stated to the authority of that case. It appears from the papers, that previously to the decree the king's sign-

manual had been obtained, and was brought into court, and the decree was made according to that; and that it is intimated at the bar was a proceeding not fit for a court of justice. If that observation could not be displaced, otherwise it would be displaced sufficiently for this purpose by this, that however the cause came into court, the authority has been universally recognised ever since. But that observation founds no objection to the propriety of the proceeding; for the case was a devise, subject to the sum of 1000l. for such charitable uses as the devisor had by a paper directed. The person to whom the estate was given so charged had taken to the enjoyment of the estate, under the will, as far as it was beneficial to himself, and had, as is frequent in such cases, taken no notice of the fact, that there was a charge for the benefit of the charity. The hospital found out that there was such a will, and if so, the money-charge, as the law then stood, was clearly at the disposal of the king. It is perfectly familiar, that where an interest of such kind is given, or where there is an escheat for want of heirs, and the fact is not communicated, it is usual to petition the king, stating that there is such an interest, and praying for some reward upon the ground of the discovery, if it can be made out. That is familiar practice, whether well or ill founded. It occurred in my experience, when Solicitor and Attorney-general, in several instances as to escheat, and the ordinary rule upon an escheat, is for the crown to give a lease, as good a lease as it can give, to the person making the discovery. This case originated in the discovery made by the hospital of the charitable disposition, and a petition was presented upon this ground; and in consequence of that the atty.-gen. filed his information. That produced the cause which is very accurately reported in Vernon upon a comparison with the papers. The answer expressly insists upon that point,

point, that if any writing was at any time made by the testator it was afterwards revoked and cancelled, and that the court could have no authority to insist, either that it was in its own disposal, or that it was in the disposal of the crown, without an enquiry upon the point, that that paper was revoked, and that it was not unreasonable that there should be some inquiry; a reason is given that made the suggestion of revocation not improbable, that subsequent to the making of this will he had charged several great sums of money upon his land, and that the whole estate would scarce amount to answer all the charges thereon.

After the answer, the case was again laid before the *Attorney-general* for his opinion, regard being had to the circumstances disclosed by the answer. His opinion is, that the executors ought to be made parties, but that then, notwithstanding the circumstances in the answer, they may, when the executors are made parties, go to a hearing. The effect of the reasoning at the hearing was, according to the book, thus:—The *Lord-keeper* argues, that the charity exists though the writing was not to be found; whereas the question was, whether the charity was not destroyed because the writing was not to be found? and the idea of indemnity against the paper being found, and expressing different charitable uses, is kept up through the whole. How it was collected that it was intended to be a permanent charity it was very difficult to say, the writing not appearing. There is a material difference between this case and *Frier* v. *Peacock*, for in that, the will itself devoting the property to charity was producible. It appears from the papers, that this decree was carried into actual execution; the papers, containing the evidence of payment of the money, a copy of the receipt, and a deduction of the costs of the suit, beginning with the first application, and including

all the proceedings, which are very reasonable, not exceeding 34l. Whether the decree proceeds upon good reasoning, or upon that which fair reasoning might displace, it asserts, that where it is altogether uncertain and indefinite it is in the disposal of the king. With regard to the doctrine here laid down there is a very strong declaration in *Freeman*. "It was said, and not
2 Freem. 261. "denied, that if a man deviseth a sum of money to such "charitable uses as he shall direct by a codicil to be "annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note nor codicil, "the court of Chancery hath power to dispose of it to "such charitable uses as the court shall think fit."—That *dictum* seems very much at variance with one way
Mos. 288, 301. of interpreting *Wheeler* v. *Sheer*. It should seem that the *Atty.-gen.* v. *Syderfen* might have proceeded upon this principle, that the testator having once given to charitable uses, if it was not shewn that he had revoked that gift his general purpose was charity, and should be enforced, though he could not shew what was the use —a very strong proposition.

It goes on thus:—"And so it was held in the case of "Mr. *Syderfen's* will, and the case of one *Jones*; but "if the will points at any particular charity, as for "maintenance of a school master or poor widows, then "the court of Chancery ought not to direct it to any "other purpose but such as is pointed at by the will." I mark this, because it is not immaterial as to some of the late doctrine of the court. "As if a devise should "be for such school as he should appoint, and appoints "none, the court may apply it for what school they "please, but for no other purpose than a school, although "it may be for what school the court thinks fit." If here is any authority in this case, it goes a length that leaves one a little to doubt, that if the disposition is of such

such general charitable use as the testator shall appoint, and he does not appoint, that is a gift, *in præsenti*, to operate at his death to give to charity, reserving only to himself to particularise, *in futuro*, by what mode that general charitable purpose shall be executed; and illustrating it by that case of such school as the testator shall appoint; that that will authorise the court to say he meant a school, though with that discretion, and that he meant only to reserve to himself the opportunity of selecting some school—that was going a great length.

In *Clifford* v. *Francis*, this doctrine is laid down, that when money is given to a charity, without expressing what charity, there the king is the disposer of the charity, and a bill ought to be preferred in the Attorney-general's name. I cite this to shew that it contains a doctrine precisely the same as the *Atty.-gen.* v. *Syderfen*, and the *Atty.-gen.* v. *Matthews*. Freem. 330.

So those three cases seem to have established, at the year 1679, that the doctrine of this court was, that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals, referred to the charity, was to be disposed of, not by a scheme before the master, but by the king, the disposer of such charities, in his character of *parens patriæ*. In the *Atty.-Gen.* v. *Baxter*, in 1684, 1 Vern. 248. it was alleged, that the charity was against law, and therefore the right of applying this money was in the king. That doctrine is recognized in other cases, that if the gift denotes a charitable intention, but the object to which the exercise of it is applied is against the policy of the law, the court would lay hold of the charitable intention, and execute it for the purpose of establishing some charity agreeable to the law, in the room of that contrary to it. That is according to *De Costa* v. *De Pas*, which I shall mention from Lord Hardwicke's notes, Amb. 228.

where you will see the ground upon which this decree was reversed. If the particular ground upon which it was reversed had not occurred, this case would prove, that the intention being charity his primary purpose would be held charitable, and they would not suppose he would relinquish that, because the secondary purpose could not be answered, but would uphold the general primary purpose by giving that which the testator had so given to dissenting ministers, to Chelsea College, and certainly in *De Costa* v. *De Pas*, Lord *Hardwicke* followed that.*

Atty.-gen. v. Combe. 2 Cha Ca. 18. Atty.-gen. v. Guise. 2 Vern. 266.

This sort of decision seems to have been followed in another case in 1679, shortly mentioned in *Vernon*, in which case it is said, in case a legacy is given to a superstitious purpose, or a mistaken religious purpose, the court will not apply it to that, but will act upon the supposed intention for charity, and give it to a real religious purpose as where charity is intended, but a mistaken charity; thus 10l. a-year for a weekly sermon upon Saturday at *St. Alban's*, the preacher to be chosen by the majority of the inhabitants: that they thought a mistaken charity, that it was quite wild that the preacher should be chosen by the majority; but still the purpose was charity, and they directed the 10l. to be paid to a catechist to preach weekly at *St. Alban's*, on Saturday, being named by the bishop of the diocese.

The *Atty.-gen.* v. *Baxter* is mentioned in Lord *Hardwicke's* note-book thus: "The case of Mr. *Baxter* upon "*Mayo's* will, the decree reversed, not upon any thing "contradicting the general principle reported to have "been stated, but because really a legacy to sixty parti-

* This being a legacy of 1200l. to support a jesuba, or seminary for the Jewish religion, was declared void, and the Attorney-general was directed to apply to the crown for a sign-manual to appoint it to some other charity, and the king did appoint 1000l. of it to the Foundling Hospital.

1 Wyatt's Dickens, 259. Ante. 147.

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"cular ejected ministers, to be named by *Baxter*, and as "of a legacy to those sixty individuals." Lord Hardwicke therefore affirms the principle, but asserts that it was ill applied in the construction of that will.

De Costa v. *De Pas*, came on in 1754. The report of that case is not very accurate, attending to the law of the country with regard to superstitious uses, Lord *Hardwicke* says, "I held the donation in this case to be a "charitable use, and that it was unlawful and void; "that the power of appointing and directing to what "charitable use it should be applied was in the crown, "and I recommended to the Attorney-general to apply to "the king for his sign-manual to direct to what charitable "use it should be applied."

The ground, therefore, does not connect itself with that *dictum* in *Ambler* as to a superstitious use. Lord *Hardwicke* held it void; but that it was given to a charitable use, and being so given, though to one unlawful and void, the crown had the right, which must be upon this principle, that the testator's intention of charity was the principal intention; that he meant at all events some charity; that his unlawful purpose was a mode of disappointing it, and the mode therefore was out of the question, and the intention should be carried into effect by another mode.

These cases do not appear necessarily to trench upon some of the later authorities in this court, which, however, I admit are not very reconcileable with some others, particularly the *Atty.-gen.* v. *Bowyer*, and Lord-chief-justice *Wilmot* goes very fully into the doctrine in his advice to Lord *Camden*.

But these cases do not necessarily trench upon the later authorities. I allude to the case of *Wheatley Church*, and some of the cases before Mr. Justice *Buller* and Lord *Alvanley*, where the *cy pres* doctrine is said to have

The Atty.-gen. v. the Bishop of Oxford. See Corbyn v. French. 4 Ves. jun. 418.

been formerly carried to a monstrous length; in later cases much restrained; for in those cases the charity was given to a lawful and not an unlawful use, but from circumstances it could not be applied, and it was held, that being a charitable intention and lawful, if you could not apply it to that you should not to another lawful use, inferring a general intention of charity. I do not go through all the cases, viz. *Baylis* v. *the Atty. general*, or the case where the gift was, to such *lying-in hospital* as the executors should appoint, and in the former a blank left for the name of the person, according to whose will the 200l. was given to *Bread-street Ward*, was not filled up, and in the latter the executor to appoint the lying-in hospital was not named, or where several particular charities are named, and the distribution is given to a person who dies before the testator, for they are not applicable to a case where it is given by the general term of "charity." Those cases are decided upon principles which both Lord *Thurlow* and Mr. *Mansfield*, in the argument of *White* v. *White*, state very fully to have gone upon this; and considering the principle, those decisions have not gone far in disappointing the next of kin, only holding that the testator having expressly said he meant to give to *Bread-street Ward*, to some lying-in hospital, or to some of the particular charities, expressly named, the selection of the objects in some cases, in others the mode being left to individuals, the testator had gone a length beyond the testators of the former class, not having left it to that person to say what charity, but having decided that himself; leaving him only the selection of some objects by the determination of the mode by which some individuals selected by him should take.

1 Ath. 220. and White v. White. 1 Bro. C.C. 12.

In *White* v. *White*, Mr. *Mansfield* said, that the obliteration of the name shall not defeat the intent so as to prevent the money from some one or all of the lying-in hospitals;

hospitals: it is impossible it should go as it was left; but under all the cases, the court will stand in the executor's place, and all the rules shew great latitude and liberality of construction, &c.; and Lord-chief-justice *Wilmot* doubts extremely whether the court ever should have gone the length it has, but says the court is now bound by precedent.

Lord *Thurlow*, in his judgment, said, it has been argued that the court has great extent of jurisdiction in making legacies certain, which were before uncertain. That observation is confined to these charitable legacies. Then referring to the *Atty.-gen.* v. *Syderfen*, he did not take notice of the circumstance, that though there had been an appointment, it might have been revoked, and the non-existence of it was, *prima facie*, evidence of that fact, that it was revoked. There was nothing more particular in the charity, in *White* v. *White*, than that it was to be some lying-in hospital. The *Atty.-gen.* v. *Hickman* is referred to by Lord Thurlow, which case is held very high authority by Lord-chief-justice *Wilmot*, in the *Atty.-gen.* v. *Bowyer*. I doubt very much whether the decree in *Wheeler* v. *Sheer*, was made upon the principle stated by Lord *Thurlow*. If it was determined upon that ground, that referring to a future codicil the testator had not by his will determined that he had as yet any charitable purpose, it is directly against some of the passages in *Freeman*, which I have stated. That doubt I express upon this ground, that there were two codicils; and in the latter the testator does not repeat that he gave to such charitable uses, but for the uses, trusts, and purposes generally. That latter codicil therefore seems, in this respect, something like a revocation of the will, as to the charitable purpose, being dropt by the codicil, and the general use and purpose only mentioned; and that reduces the case precisely to what it would have been, if

2 Eq. Ca. Ab. 193.

Mos. 288, 301.

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by the will only general uses, intents, and purposes had been mentioned, and not charitable purposes. The court does not go upon that ground that Lord Thurlow intimates, that they would lay hold of the testator's reference to a future act, as shewing that his intention for charity was not even inchoate at the date of the will; and therefore determined in favour of the next of kin.

2 Eq. Ca. Ab. 193.

The *Atty.-gen.* v. *Hickman*, is very strong, and forms the foundation of a great deal of what Lord-chief-justice *Wilmot* aid. A that case is reported in *Equity Cases Abridged*, and the *Atty.-Gen.* v. *Doyley*, as there reported, are agreeable to the register's book. In the former it is given in a method, the testator will not prescribe, but leaving it to another person, requiring him to take the advice of two other persons. I take it this case goes a very considerable length, authorised by preceding determinations, for charity as particularly favoured; for what any one was to take, what charity, and by what mode, all this is left totally uncertain by the testator, and he had taken no means to ascertain it, but what had altogether failed by the death of all these persons; and yet the court said they would entrust themselves with the discretion, which was left personally to others, upon the ground that charity was the essence and substance, and the mode only a shadow.

2 Eq. Ca. Ab. 194.

4 Vin. 485.

The distinction is very nice between the words used in that case, and a gift to such charities as A, B, and C should appoint, if you do not hold that in the latter instance the same doctrine applies; this being clear that the generality of the term "charity" is no objection to a legacy to charity, and therefore there is no ground to say, though the discretion fails in the one place, it shall not in the other; and all the cases shew that charity in general is sufficient.

By another account of this case from a manuscript note,

note, this is represented as falling from Lord *King*. "The substance of the charity remains, notwithstanding the death of the trustees before the testator; and though at law it is a lapsed legacy, yet in equity it is subsisting; and here is a sufficient certainty of the testator's intention to revive it.—The intention, therefore, of the party is sufficiently manifested, that this charity should continue within 43 Eliz. c. 4."

This case was followed by the *Atty.-gen.* v. *Doyle*, in which the court said, they would cut the difficulty by a sort of technical rule, that equality is equity; and they divided the subject into two moities, giving one moiety to the relations, and the other to such charitable uses as the court itself should appoint.

These cases are pretty fully recognised in Lord-chief-justice *Wilmot's* judgment, which recognises the doctrine of the court; that it sees a general intention for charity in these cases*. It is very difficult, I think, seeing that intention to build a Jewish synagogue, to discover an intention to build a Foundling hospital, rather than the money should not be applied; but the court has said so always. He states, *De Costa* v. *De Pas* distinguishes, that as it was a charitable bequest in the intention of the testator (and I repeat that I should not have discovered that), though of such a nature as not to be permitted; that it was not a superstitious use given to the crown for its own u se, which corrects that *dictum* in *Ambler*. Lord-chief-justice *Wilmot* follows the former cases. He does not say what would become of the fund, if the purpose is legal, but it cannot be applied to that purpose; but he says, if the purpose is unlawful, these cases authorise the court to say it should be applied to some

* The Lord-chancellor read several passages from Lord-chief-justice Wilmot's arguments, which has been since printed in his reports.

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other charitable purpose, and then it devolves upon the crown as *parens patriæ*.

I do not state the case of *Wheatley Church*, and some of Lord *Alvanley's* later cases, adopting that opinion of Lord *Kenyon*, that if there is a legal purpose, which from circumstances cannot be executed, this court will not carry it into execution *cy pres*, by directing it to any other purpose. Mr. Justice *Buller* also held the same doctrine, and that applies to this sort of case, that where it would be a good personal gift to persons in an hospital, &c. but cannot, on account of the statute of mortmain or otherwise, take place, if it cannot be applied in the mode directed, it must fail altogether.

All the cases prove, that where the substantial intention is charity, though the mode by which it is to be executed fails by accident or other circumstance, the court will find some means of effectuating that general intention.

In this case it is not to be argued merely upon *Vaster's* death: I agree with Lord *Thurlow*, that makes no difference; for the question is, what the testatrix must be taken to have meant, if she had died immediately after the will was executed; and it is infinitely difficult to contend, that the court can construe it otherwise, because he died in her life-time, than if he had outlived her. It is said if he had, he would have had all his life to select all the charities. I doubt that extremely. It is assuming the question. The court at least would call upon him to act. The *Atty.-gen.* v. *Glegg* proves that. The question would arise exactly in the same way; for if he had survived her, and had addressed himself to the execution of the trust, and had died suddenly while about it, and before he had completed it, the mode would have failed precisely, as by his death before her: for unless

1 Atk. 356, Amb. 584.

unless the means by which it is to be executed were effectuated by his act, the circumstance of his dying before her can make no difference as to the question whether the court will supply other means. The question results upon the whole—did she intend he should be a trustee for charity. If these authorities are to stand, though I had for ten years a strong persuasion upon this will, that she meant the objects should be selected by him only, I must check such conjectures, by attention to the rules upon which the court acts with regard to charities; and I am reluctantly driven to say, there is no substantial difference between these words, in which she has bequeathed to *Vaston*, to dispose in such charities as he shall think proper, and the words in which it was expressed in the *Attorney-gen.* v. *Hickman*.

Those cases call upon me to say the general intention of this testatrix, who seems to have been saturated and sated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and, according to these precedents, Vaston was only the means and instrument by which that general intention was to be executed; and therefore this court will carry that general intention into effect.

The next question, by what means that is to be done, is a most difficult question; for it being established, that where money is given to charity generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift, absolutely indefinite and without qualification, and a case in which by matter, *ex post facto*, the gift stands before the court, in consequence of that accident, as if it had been originally given indefinitely, without any means for carrying it into execution prescribed. All I

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can say upon it is, I do not know what doctrine could be laid down that would not be met with some authority upon this point, whether the proposition is, that the crown is to dispose of it, or the master by a schedule.

2 Atk. 562, 567. Reg. Book, A. 1748. 283.

In *Cook* v. *Duckenfield*, it appears by the register's book to have been executed by a scheme before the master. There the means prescribed by the testator could not be followed, and the court took upon itself to execute it by a scheme before the master, not as represented in the report of the *Atty.-gen.* v. *Herrick*, by sign manual.

Amb. 712.

The *Atty.-gen.* v. *Herrick*, was a case of an estate vested in trustees. They were to sell, receive the money, and apply it to some particular purposes, and then to charitable uses. In the natural construction you would say, they were to determine what charitable uses, under the ordinary control of the court. *Cook* v. *Duckenfield* is there referred to; and another case, in 1748, is there stated, as from Lord Hardwicke's notes, that there being no particular charity, his majesty may dispose of the 400*l.* to such charity as he shall think fit. I cannot collect what that was, nor can I find the passage referred to in Lord Hardwicke's notes.

The case of *De Costa* v. *De Pas*, is by no means given in the words of Lord *Hardwicke's* notes, as it there purports to be. The *Atty.-gen.* v. *Peacock* is mentioned, which I have no doubt from the date was the case upon *Frier's* will. It was difficult to say there the trustees were to determine what poor people were to take: recollecting what the law did upon uses so expressed, you cannot well call them trustees for the poor. The lord-chancellor concluded, that he would apply to his majesty, as Lord Nottingham did in the case of the *Atty.-Gen.* v. *Peacock*.

The difficulty upon this case is, that it seems a devise

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to trustees still existing, and that the meaning was, that the distribution should be by them, if they thought proper; but Lord *Apsley* thought otherwise, and that property was disposed of as I have stated. In the other cases, where all the trustees are dead, in others where some of them are dead, the discretion being wholly or partly gone, or where the trustees surviving would not act, or where some would and others would not, yet the court in a great number, if not in all those instances, did, by a scheme, distribute the fund.

The run, therefore, of the cases, with the exception of the last that have occurred, rather import, that where originally a trust is created for the distribution of a charity, and the trust is not carried into execution, because it was originally a trust, and not in a strict sense a general indefinite gift to charity general and undefined, or to the poor in general, the court would execute it by a scheme. And in the case I put of *Vaston* surviving the testatrix, and partly executing, and dying before he had completed the execution, the question would come to this, whether the court should supply the defect; or on the other hand, whether the court would carry on that which it might have taken into its own hands, if a bill had been filed against *Vaston*, and he had begun to execute in consequence, and had not lived to finish it; the question there would have arisen, whether the court should take it upon itself, as it would be controlling his discretion, if he had lived; and whether the court might not have gone on itself to select the objects. Lord *Thurlow* seems to have thought there was a ground for distinguishing it. There is a singular expression used by him in one of the cases, "the property becoming *fiscal*." Yet he seems to have thought, that if *Vaston*, in the execution of his duty, according to a sound construction of his right, had excluded

cluded certain persons, that would have been controlled by this court; I allude here to the recommendation about poor clergymen; if the question was drily upon this, whether that makes him a trustee for the poor clergymen, it is very difficult to say it does, in a strict sense; for if words of recommendation are not to be taken to be imperative, unless the objects and the subject are certain, it is difficult to say that if recommendation is mounted upon a gift purely discretional, where the subject is wholly uncertain, that shall be trust. Lord *Thurlow* thought it necessary for him to apply the strict question, trust or no trust; but upon the principle very strongly stated in the *Atty.-gen.* v. *Glegg*, that however extensive, this court would control the discretion. Lord *Thurlow* seems to think a due exercise of the discretion would entitle the court to call upon him to attend to the recommendation, and accordingly, in the decree, directs the scheme to have regard to that recommendation; and if *Vaston* had been alive, I think he would have directed *Vaston* to have had the same regard: and I doubt whether if the decree, upon the principles attaching to charitable uses, must have called upon the trustees, it can be said that because the trustee is dead, the court is not to make a decree ordering such direction; for no such order could be given to the king executing by sign manual. Therefore I rather think the decree is right. I have conversed with many persons upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted, but the general principle thought most reconcileable to the case is, that where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign manual; but where the execution is to be by a trustee, with general

Malim v. Keighley. Ves. 333, 529.

ral or some objects pointed out, there the court will take the administration of the trust. But it must be recollected that I am called upon to reverse the decree of a predecessor, and of a predecessor who all the reports inform us had great occasion to consider this subject. I should hesitate with reference to that circumstance, but where authority meets authority, and precedent clashes with precedent, I doubt whether I could make a decree more satisfactory to my own mind than that which has been made; and I have the less difficulty from the doctrine hinted at in the *Atty.-gen.* v. *Matthews*, as the doctrine of the constitution of the country: and that is also the language of Lord-chief-justice *Wilmot*, that whether this court, or the king by sign manual, executes it, the constitution finds a trustee in the court or the king to act in the one case, as the court would act, and considering the king *parens patriæ* as one who could act, exercising a discretion with reference to the intention. Therefore there would not be, as there ought not, any difference in the execution, and I am delivered from the anxiety I should feel from the consideration that I should be taking away from the natural expectations of those whose disappointment I regret as much as any one; for those whose duty it would be to advise the crown, would think themselves equally bound to attend to the particular object. Upon this ground I am of opinion the decree is right; at least so far, that I am not disposed to do that in effect, which no judge will in terms take upon himself, to reverse decisions which have been acted upon for centuries. If this decision is wrong, and if this strange doctrine, as I should have called it, if I had sat here two centuries ago, that you can find a charitable purpose in a purpose that is to fail altogether, can be shaken, I can do no more than allow them to go to a higher tribunal;

Ante. 34.

Ante. 367.

bunal; and I have some consolation from the precedent given by Lord *Thurlow*, and the recommendation of Lord *Rosslyn*, to rehear the cause, in being enabled to say, the experiment may be made without expence to the parties. I support the decree therefore, giving the costs of all parties as between attorney and client, out of the fund.

The decree was affirmed in the house of lords, upon appeal, on the 5th March, 1806.

Where a testator misnames his property, yet the court will maintain the charity; as,

Michael. Term, 1789. Finch v. Inglis.

Geo. Stanbridge, after giving to his wife Mary, for her life, the interest of such monies as he should die possessed of, or should be purchased with the residue of his estate after his decease, gave to the treasurer of the City of London Lying-in Hospital for Married Women, in the City-road, 300l. Bank stock; and also gave, by his will and codicil, other charitable and other legacies, chiefly in Bank stock: and not having any Bank stock at the time of his death, but dying possessed of a considerable surplus property in other funds, the respective legatees filed their bill against the executors for the establishment of their legacies out of his general estate.

Lord *Thurlow*, chancellor, by decree referred it to the master, to inquire what Bank stock, and other public securities, the testator was possessed of at the time of making his will, and of his codicil, and of his death, and to take a general account of his debts and effects.

17 Jan. 1792.

And this cause coming on again for further directions, it appeared that the testator, at the times above-mentioned, was possessed of 3l. *per cent.* reduced annuities, 4l. *per cent.* annuities, and 3l. *per cent.* consolidated annuities, considerably more than sufficient to pay his debts

debts and legacies; but that the testator was never possessed of Bank stock, on which account the master had not computed interest on the legacy given to the Lying-in Hospital.

The questions were, 1. Whether the legacies given in Bank stock should be established, and paid out of the other funds? And,

2. Whether interest could be allowed thereon?

Lord *Thurlow*, chancellor, ordered, That the executors should sell out so much of the 3l. *per cent.* reduced annuities, and 4l. *per cent.* annuities, as, with the amount in 3l. *per cent.* consolidated annuities then standing in their names, should be sufficient to answer the several stock legacies; and that such interest should be computed on the stock legacies, as would have arisen in case they had all consisted of 3l. *per cent.* consols.

This cause being set down again, upon the master's further report it appeared, that Mary, the testator's widow, died on the 15th of March, 1788—and that he had computed interest on 300l. 3 *per cent.* consols, from the preceding half-yearly payment of dividends previous to her death, to Midsummer, 1792, at 40l. 10s. which was then ordered to be paid to the treasurer, and that capital to be transferred to the trustees for the charity. 8 Dec. 1792.

So likewise, where, for want of accurately expressing the title of a charity, two claimants arose, the court notwithstanding maintained the charitable bequest. Trinity Term, 1792. Atty.-gen. v. Smith.

Thomas Quelch, by his will, dated in 1762, gave to trustees all the remainder of his reduced and long annuities, in trust, to pay the dividends to his brother Richard; and, after his decease, he gave the same among his children, with remainders over, in default of children, to

divers charities—among which he gave 500l. (part thereof) to "the Lying-in Hospital for Married Women," and appointed said Rich. Quelch sole executor.

Richard Quelch died in 1785; and by his will, conceiving that, "in case of failure of his brother's will by "mortmain or otherwise, the several stocks in that case "became his property, he gave the same as therein "directed. The 500l. reduced annuities given to the "Lying-in Hospital for Married Women becoming "lapse, being two claimants, he gave the same to the "Lying-in Hospital in Brownlow-street, near Long acre, "as believing that it was intended for that hospital;" and appointed defendant Smith sole executor.

An information was now filed, at the relation of the above hospital, against Smith and the City of London Lying-in Hospital in the City-road, praying that Smith might account for the legacy and dividends, and that he might either admit assets of both testators, or account for their respective personal estate.

Lord-chancellor *Thurlow* established the charity, and referred it to the master to take an account of the personal estate of the testator, Thomas Quelch, and of his debts, legacies, &c. and to compute interest, &c. and to inquire what lying-in hospitals there were which were intended and came within the contemplation of the testator's (Thomas Quelch's) will; and the final decree was in favour of the same hospital.

Isaac v. Gompertz. 1 Ves. 44. 1789.

It was once held, but I do not find any other case to confirm the doctrine, that stock cannot be appropriated to the support of a permanent charity, because it is in its nature fluctuating; and that the proper order would be to sell such stock, and apply the produce in money to the charity. But it is the daily practice, and the statute affords no ground for controverting it, to bequeath legacies

cies of stock to charities, as well incorporated as not: the permanence of a charity offers no reason why it should not take fluctuating property, and apply the stock itself, or its produce, in the best manner possible. Stock is personal estate, and not more fluctuating than a legacy of money; and if accurately described, has no uncertainty in it.

The court seems to have given to the representatives, the power of disposing or suggesting a charity where there has been any want of specification in the will; so likewise where the will has not been proved.

Thus Mr. Holt bequeathed one-half of the residue of his personal estate, which was very considerable, to the Foundling Hospital, and the other to the "*Lying-in* "*Hospital, and if there should be any more than one of* "*the latter, then to such of them as the executors should* "*appoint.*" He afterwards struck out the name of the executor, and never inserted another, and died in 1775: the next of kin took out administration with this testamentary paper annexed. The Lord-chancellor, *Thurlow*, said, It seems if this had been a private legacy, and a selection of objects out of which the legatee was to be chosen, it is allowed that it would be of the essence of the legacy, and it could not take place, unless there was an expression of general favour, to let in all the objects. My notion is, that in the case of charities, this court derives a great latitude of authority from the extensive nature of most charities; because they cannot go upon the same strict rules which prevail in private cases. But that is well resolved into the purpose and the mode. When the testator is willing it shall go in the largest extent, the court will follow his intent in marking out objects. I wish to follow this method in construing the intent of testators. 1 Bro. Cha. Rep. 12.

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I have stated a distinction between charities and private cases, so as to lay down a latitude more wide than is to be wished to be left to courts of justice. In the *Downing College* case, the difficulty was, that when the anterior estates were spent, there was nobody to take the equitable dominion; and the question was, whether the analogy held between it and a legal estate with nobody to take, which descends to the heir-at-law, till an object arises. Even in private cases, the distinction between the object and the mode has been attended to. I will look into the cases, whether selecting one out of the objects is regulating the mode only.

Ante. 204.

In July following, his lordship gave judgment.

The question is here, whether the legacy is void, the executor's name being struck out, and there being no person on whom it could devolve; or whether the court will sustain it?

It has been argued, that the court has great extent of jurisdiction in making legacies certain, which were before uncertain; and secondly, in applying them where it is not known to what use they were intended. There has been at all times an exercise of this authority, where a legacy has been doubtfully given: as in *Atty.-gen.* and *Syderfen*; which was a legacy to such charitable uses as *he had appointed*, but the appointment was not found; the court decreed, the charity to be directed by the crown, as there had been an appointment. In *Wheeler* and *Sheer*, in Lord King's time, there was no appointment, but the testator had procrastinated the legacy; that evidence satisfied Lord King that the testator had not so fixed his mind as to separate the legacy from the personal fund, and he would not carry the charity into execution. The cases have proceeded upon notions adopted from the Roman and civil law, which are very favourable to charities,

1 P.Wms. 674, 425.
Finch, 104, 222, 245.
Ante. 250.
Moseley, 288, 301.
Ante. 265.

rities, that legacies given to public uses not ascertained shall be applied to some proper object. From Swinburn down to Lord Hardwicke's time, that would be the effect where the object is disappointed: but the present case is different; here the testator giving a legacy to the next of kin, and to the executor, names a particular charity, a residuary legatee; the question is only how the trust shall be carried into execution. I remember to have read a case somewhere, where a legacy is given to B. for the benefit of non-conforming ministers, with the advice of C. and D.: at the testator's death B. C. and D. were all dead; yet the court sustained the legacy. His lordship therefore referred it to the master to consider to which of the lying-in hospitals the legacy should be paid. And he afterwards ordered it to be paid to one which the master reported to be most proper. 2 Eq. Ca. Abr. 193.

Where trustees have power to distribute generally according to their discretion, without any object pointed out, or rule laid down; the court interposes not, unless in case of a charity, which is different, the court exercising a discretion, as having the general government and regulation of charity. 2 Vezey, 89. Gower v. Mainwairing.

Where a sum of money was bequeathed "*for the "benefit of the poor clergy,*" the court established the legacy, and directed it to be paid to the corporation of the sons of the clergy.

But an ambiguous bequest for books, was declared void, for uncertainty.

Ralph Bradley, by will 1788, gave all his stock in the public funds, in trust, to pay dividends to certain persons for life, out of the stock and annuities to be purchased, but subject to the foregoing trusts, "to raise "and apply the yearly sum of 500l. for 20 years, to com- "mence from 3 years after his decease, and from that Browne v. Yeale. July, 1791. Reg. Lib. A. 1790. fo. 579.

"period of 20 years, the yearly sum of 1000l. until Jan. "1860, in trust, to invest the residue of the dividends "in the purchase of stock: and that the 500l. and 1000l. "and the dividends to arise from Jan. 1860, of the "stocks so to be purchased, and what he should die "possessed of, subject to the aforesaid trusts, should be "applied in the purchasing such books, as by a proper "disposition of them, under the following directions, "may have a tendency to promote the interests of virtue "and religion, and the happiness of mankind; the same "to be disposed of in Great Britain, or in any other part "of the British dominions: this charitable design to be "executed by and under the direction and superin-"tendency of such persons, and under such rules and "regulations as by any decree or order of the high court "of Chancery shall, from time to time, be directed in "that behalf."

The bill prayed the establishment of this charity, and directions for carrying it on.

This case has been said to be anomalous, and not a case of charity; but it is very difficult to sustain that opinion. There is a considerable number of institutions in this country, for the purpose of public instruction, which are always considered eleemosynary; great bodies with large funds; as the society for propagating the gospel, who are within this will. It is very difficult to consider how the disseminating of Baxter's Call to the Unconverted, and the Jewish case, can be considered and acted upon as charities; and yet a purpose of instruction, according to the established law of this country is not a charity. The danger of such a discretionary bequest, with reference to the statute, as in this will and Mrs. *Cam's* will, with reference to the statute of 9 Geo. II. c. 36. is a very material consideration. It has never been

Ante. 147.

been decided, that where an absolute discretion is given to a person to dispose in charity, he cannot lay out the fund in land *. The disposition was held void for uncertainty, and the property went to the next of kin, not in general charity, according to the older cases. 6 Ves. jun. 47, 49, 50.

This case does not appear to have received much attention, or to have been very strenuously argued. There is no note of what Lord *Thurlow* said. The object expressed was so absurd and impracticable, that it was impossible to execute it. One difficulty was as to the manner in which the books were to be communicated. It is not very easy to be reconciled with other cases decided by Lord *Thurlow*. Ibid. 57.

Where an unlimited trust is reposed for charitable purposes, it is necessary to define the objects, otherwise the legacy cannot be maintained.

J. Barrow, by his will, reciting that there might be services done by different people, and divers small sums, charities, and benefactions had been given and paid by him and his late brothers, he authorised and empowered his trustees to pay and satisfy such person and persons for such services, when performed, and to continue such charities and benefactions, or to bestow any other, as they in their discretion should think fit: provided the same did not exceed in the whole 1000l. 3 Ves. jun. 157. Coxe v. Basset. 1796.

The court could not establish this for its uncertainty. It was declared void as to the real estate: and as to the personal estate, how long was the charity to continue? He was an annual subscriber as long as he pleased. He meant to recommend only: it was not mandatory: the words are, "authorise and empower." It was to exempt the trustees from being called to account for doing

* I collected this from what is mentioned here, but the case itself does not appear to have been reported.

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it. The court declined saying any thing about the charities.

So where an entire discretion was reposed in a trustee of high respectability, the bequest was declared void.

9 Vez. jun. 399. 1804. Morice v. Bp. of Durham, Dr. Barrington.

Ann Cracherode, by will in 1801, bequeathed all her personal estate to the *Bishop of Durham*, his executors, &c. in trust, to dispose of the ultimate residue to such objects of benevolence and liberality as the bishop in his own discretion should most approve of, and appointed him sole executor.

The master of the rolls, Sir *William Grant*, said, the only question was, whether this trust be a trust for charitable purposes. That it was upon some trust, and not for the personal benefit of the bishop, is clear from the words of the will; and is admitted by his lordship, who expressly disclaimed any personal benefit. That it is a trust, unless it be of a charitable nature too indefinite to be executed by the court, has not, and cannot be denied. There can be no trust, over the exercise of which this court will not assume a control; for an uncontrolable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership, in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be some body in whose favour the court can decree performance. But it is now settled, upon authority, which it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object; but the particular mode of application will be directed by the king in some cases, in others by the court.

Then,

Then, is this a trust for a charity? Do purposes of "liberality and benevolence," mean the same as objects of charity? That word, in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this court. Here its signification is derived chiefly from the statute of 43 Eliz. c. 4. Those purposes are considered charitable, which that statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear, liberality and benevolence can find numberless objects, not included in that statute, in the largest construction of it. The use of the word "charitable" seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion. Supposing the uncertainty of the trust no objection to its validity, could it be contended to be an abuse of the trust to employ this fund upon objects, which all mankind would allow to be objects of liberality and benevolence; though not to be said, in the language of this court, to be objects also of charity? By what rule of construction could it be said, all objects of liberality and benevolence are excluded, which do not fall within the statute of Eliz.? The question is not, whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it? I am not aware of any case in which the bequest has been held charitable, where the testator has not either used that word to denote his general purpose, or specified some particular purpose, which this court has determined to be charitable in its nature. All the cases upon that subject are to be found in the report of *Moggridge* v. *Thackwell*. Ante. 250.

Brown v. *Yeale*, I should have thought a much more doubtful case. There was ground for contending that Ante. 279.

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the particular purpose specified was charitable in itself, according to the decisions of this court; and it was described by the testator as a charitable design. But here there is no specific purpose pointed out, to which the residue is to be applied: the words "charity," and "charitable" do not occur: the words used are not synonymous: the trusts may be completely executed, without bestowing any part of this residue upon purposes strictly charitable. The residue, therefore, cannot be said to be given to charitable purposes; and, as the trust is too indefinite to be disposed of to any other purpose, it follows that the residue remains undisposed of, and must be distributed among the next of kin of the testatrix.

10 Vez. jun. 522. 1805. Morice v. Bp. D.

The bishop afterwards appealed from this decree to the lord-chancellor, when the same arguments were recapitulated and much enlarged; relying that if this was not a good bequest to a charity, the bishop had a right to avail himself of it, for executing the benevolent intention of the testatrix, disclaiming any part of it for his own use. Hence it formed the ground of reasoning, to define the distinction between the terms charity and liberality: and it was urged, that the statute of Eliz. embraced a variety of objects that do not properly come within the ordinary meaning of the term charity, but fall under the description of liberality, in its usual sense, as the repairs of bridges, ports, &c. Money directed to be applied for those objects, if not prevented by the statute of Geo. II. would be applied in this court as a disposition to charity, &c. &c. and if the words had been "liberality and charitable purposes," the construction must have been a liberal application to such charitable purposes as the executor should think fit, extending it beyond the constrained sense of charity. The attorney-general concurred in the appeal, and urged that this

this was a disposition substantially to charity; and if so, that there was no such uncertainty as would defeat it, for the only question would be, whether it should be executed by the court, or by the sign-manual, &c.

The Lord-chancellor Eldon, in the argument, observed, that, if a testator expressly says he gives upon trust, and says no more, it has been long established, that the next-of-kin will take. Then, if he proceeds to express the trust, but does not fully express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said, he gave upon trust, and stopped there, as in *Bishop Cloyne* v. *Young*. Then it was urged for the plaintiff, that as to then ature of the trust, it must be admitted, that if the bequest is in trust for charity, it is no objection that the charity is not particularly defined; neither is it necessary that the testator should use the word charity: this led to a correct definition of the words "charity and benevolence," as given by Dr. Johnson, Cicero, and Paley, but that the testatrix having selected the word *liberality*, and avoided *charity*, must have meant something very different from charity. There are various instances of liberality that cannot be described as charity—the establishment of a cabinet of natural history, anatomical exhibitions, galleries of pictures, a legacy to the African society, &c. &c.

2 Vezey, 91.

Cic. de Off. lib. 1. s. 8. s. 14. lib. 2. s. 16.

1 Paley, Mor. Phil. 256.

His lordship, in pronouncing judgment, *inter alia*, held, that if a testator means to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next-of-kin takes. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities; that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion, whether to make the applica-

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tion or not, it is absolutely given; and it is the effect of his own will, and not the obligation imposed by the testament, the one inclining, the other compelling him to execute the purpose. But if he cannot, or was not intended to be compelled, the question is not then upon a trust that has failed, or the intent to create a trust; but the will must be read as if no such intention was expressed, or to be discovered in it.

2 Bro. C. C. 88. 236. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust; for of necessity the alleged trustee is to execute the trust; and the property being so uncertain and indefinite, it may be conceived the testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that which is technically called a trust. Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered are to be found in a will, not expressly creating trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the court as evidence, that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court, to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended.

But the principle of those cases has never been held in this court, applicable to a case where the testator himself has expressly said, he gives his property upon trust. If he gives upon trusts hereafter to be declared, it might perhaps originally have been as well to have held, that if he did not declare any trust, the person to whom the property was given should take it. If he says he gives in trust, and stops there, meaning to make a codicil or an addition to his will, or where he gives upon trusts which fail, or are ineffectually expressed, in

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all those cases the court has said, if upon the face of the will there is declaration plain, that the person to whom the property is given is to take it in trust; and though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those who were to take by the will, for those who take under the disposition of the law. It is impossible, therefore, to contend, that if this is a trust ineffectually expressed, the bishop can hold for his own benefit.

The next consideration is, whether this is a trust effectually declared, and if not as to the whole, as to part. I put it so; as it is said, if the word "benevolence" means charity, and "liberality" means something different from the idea, which in a court of justice we are obliged to apply to that word "charity," (and I admit we are obliged to apply it to many senses, not falling within its ordinary signification) there is a ground for an application in this case partially, if it cannot be wholly to charity.

Atty. v. *Wborwood*, 1 Vez. 634. where the substratum of the charity fails the superstructure must fail with it. *Atty.* v. *Doyley*, is the only case cited for a proportional division. The only case decided upon any principle that can govern this, is *Brown* v. *Yeale*, which applies strongly. I do not trust myself with the question, whether the principle was well applied in that instance; but the decision furnishes a principle, which the court must endeavour well to apply in cases that occur. The principle upon which that trust was ill declared is this, as it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that controul; so that the administration of it can be reviewed by the court; or if the trustee dies, the court itself can execute the trust; a

4 Vin. 485. 2 Eq. Ca. Abr. 194. 7 Ves. jun. 58. Ante. 37. 164. Ante. 246.

trust,

trust, therefore, which, in case of mal-administration, could be reformed, and a due administration directed; and then, unless the subject and the objects can be ascertained upon the principles familiar in other cases, it must be decided, that the court can neither reform mal-administration, nor direct a due administration. That is the principle of that case. Upon the question, whether that principle was well applied in that instance, different minds will reason differently. I should have been disposed to say, that where such a purpose was expressed, it was not a strained construction to hold that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning; and the testator having stated that to be the charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to this court, ought to be taken to have meant that.

Atty. v. Stepney. 10 Vez. jun. 22. Ante. 128.

Upon these grounds, in a subsequent case as to the Welch charities, it appeared to me too much considering the society in this country for the propagation of the gospel, to say, a trust for the circulation of bibles, &c. was not good. Then looking back to the history of the law upon this subject, I say, with the master of the rolls, that a case has not been yet decided in which the court has executed a charitable purpose, unless the will contains a description of that, which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general. Upon these cases, in which the will devotes the property to charitable uses, described, observation is unnecessary. With reference to those in which the court takes upon itself to say, it is a disposition to charity, where in some

9 Vez. jun. 406.

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the mode is left to individuals; in others, individuals cannot select either the mode or the objects, but it falls upon the king, as *parens patriæ*, to apply the property, it is enough at this day to say, the court by long habitual construction of those general words, has fixed the sense; and where there is a gift to charity in general, whether it is to be executed by individuals selected by the testator himself, or the king as *parens patriæ*, is to execute it (and I allude to the case in *Levinz*[a], it is the duty of such trustees on the one hand, and of the crown upon the other, to apply the money to charity in the sense which the determinations have affixed to that word in this court, viz. either such charitable purposes as are expressed in the statute (43 Eliz. c. 4.) or to purposes having analogy to those. I believe the expression "charitable purposes," as used in this court, has been applied to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the statute given to all the purposes described.

[a] Lev. 167.

The question then is entirely, whether this is, according to the intention, a gift to purposes of charity in general, as understood by this court; such that this court would have held the bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees, where the gift is to charity in general: or is it, or may it be, according to the intention to such purposes, going beyond those, partially, or altogether, which the court understands by "charitable purposes;" and if that is the intention, is the gift too indefinite to create an effectual trust, to be here executed? The true question is, whether if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not

equally, according to the intention, have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this court construes those words; and if according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words, the court could have charged him with mal-administration, if he had applied the whole to purposes, which, according to the meaning of the testator, are benevolent and liberal, though not acts of that species of benevolence and liberality, which this court in the construction of a will calls charitable acts.

The question, therefore, resolves itself into that; and if so, then all the consequences follow. If on the other hand the intention was to describe any thing beyond, that, then the testator meant to repose in the bishop a discretion not to apply the property for his own benefit, but that would enable him to apply it to purposes more indefinite than those to which we must look; considering them purposes creating a trust; for if there is as much of indefinite nature in the purposes intended to be expressed, as in the cases to which I at first alluded, where the objects are too uncertain to make recommendation amount to trust by analogy, the trust is ineffectual; the only difference being, that in the one case no trust is declared, and the recommendation fails; the objects being too indefinite; in the other, the testator has expressly said it is a trust: and the trustee consequently takes not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this court. The intention was to create a trust; and the object being too indefinite, has failed.

The consequence of law is, that the bishop takes the property upon trust, to dispose of it as the law will dispose

pose of it: not for his own benefit, or any purpose this court can effectuate. I think, therefore, this decree is right—affirmed.

An ambiguity of expression, whether two or only one legacy was intended, was lately considered on Mrs. Beard's will. Currie v. Pye, and Atty.-gen. Hil. T. 1809. Rolls. MSS.

Charlotte Susannah Beard, by will devised and bequeathed all her real and personal estate, whatsoever and whereso-ever, not thereinafter, or by any codicil she might there-after make, otherwise disposed of, in trust, to sell and dispose thereof, and to pay thereout, all her just debts, &c. and subject thereto, in trust, to pay and discharge the annuity thereinafter-mentioned: and also all such other sums, legacies, and bequests, as she had already given, or might give by any codicil, or which she might name in any memorandum or loose paper, or in any pocket-book, either written in her own hand, or signed by her. And directed her trustees to stand possessed of all the remainder of her personal estate, and the produce of her real estate (subject as aforesaid) for the benefit of such persons, and the several purposes as by any codicil, or by any memorandum or loose paper, or any pocket-book, or otherwise, either written in her own hand, or signed by her, she might name, give, declare, direct, or appoint. By a codicil dated prior to the will, she gave to Dr. Currie, of Chester, 1000l. with thanks for his goodness to her. To public and private charities she gave and be-queathed 1000l. to be paid annually under Dr. Currie's discretion. And by a codicil subsequent to the will, she gave to "the poor of Chester 1000l. for ever, to be distributed annually under the direction of said Dr. Currie."

A bill was filed by Dr. Currie to establish the will. The attorney-general, on behalf of the public and private

charities alluded to by the first codiciliary paper, claimed out of the produce of the said testatrix's estate, the annuity or yearly sum of 1000l. and insisted that a sufficient part of the produce of the said estate ought to be set apart and secured to answer the said annuity. And that the said principal sum of 1000l. should be laid out at interest for the benefit of some public and private charities, at the discretion of plaintiff. It was alleged by the trustees, that the estates were not of sufficient value to produce a yearly sum of 1000l. and that the estate which was subject to the payment of the said testatrix's debts, amounted only to about 800l. and that the testatrix herself had calculated the estate, both real and personal, at the value altogether of 8000l. or thereabouts, and no more; and had often declared, that she was fearful there was a mistake or blunder in the bequest of the said annual sum of 1000l. to the poor, and that her intention was to leave the interest of the sum of 1000l. to be so applied, and not the annual sum of 1000l. and that she would rectify the mistake, and add a legacy to the plaintiff Philip Humberston. And they apprehended that she intended the sum of 1000l. by the 2d codiciliary paper, given to the poor of Chester, to be in lieu of the annual sum of 1000l. and as a rectification of the said mistake; and particularly so, as she had by the same paper, immediately after giving the said sum of 1000l. given to the plaintiff, Philip Humberston, a legacy of 100 guineas.

It was insisted for the heir-at-law, John Beard, that the said charitable bequest, as far as it was sought to be payable out of the real estate and mortgages, was void by the statute of mortmain.

The court held, that both the charity legacies were distinct from each other, one being for such charities as

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Dr. Currie should think fit, and the other for the poor of Chester: which latter might have been a good legacy, on the authority of *West* v. *Knight*, *Attorney* v. *Clarke*, and *Chapman's* case; and an account was directed to be taken, &c.

1 Ca. Cha. 134. Ambl. 422. &c. 1 Ves. Ante. 247, 236, 241.

Upon a rehearing for further directions, on the report it appeared that the estate consisted of real and personal property, and therefore the question was raised by the heir-at-law of Mrs. Beard against these charities, "Whether the court could marshall assets so as to protect them:" and the cases of *Makeham* and *Hooper*, and the other cases stated in section 11, were relied on: and the master of the rolls decided in favour of the heir-at-law, as to that portion of the real estate which was derived by sale, and devised to the charities; but gave the rest to the charities.

In a late case, which has not yet been reported, the uncertainty was of a bequest to "hospitals for the blind:" the charities instituted for that affliction are all schools of industry; and no evidence could be procured of the testatrix having intimated or expressed any particular intention of the charity she wished to patronise.

Elizabeth Yeates, of Battersea, widow, by will dated 22 March, 1794, after giving divers legacies, bequeathed the residue of her estate in these words: "And when all other demands are satisfied, then the remainder, and all residue, be divided between the hospitals for the blind, and for incurable lunatics, share and share alike."

Atty.-gen. v. Curteis. 1809. MSS.

The will was proved on the 10th of April, 1795, with a limited administration as to several annuities, and as to residue of effects of the testatrix's late mother.

The corporation of London, as governors, *inter alia*, of Christ's hospital, and as trustees of Bethlem hospital, for the reception of incurable lunatics, and the treasurer of

St. Luke's hospital for incurable lunatics, filed their bill against the treasurer of the school for the indigent blind, in St. George's-fields, and the treasurer for a similar school at Liverpool; each of whom claimed a participation of this bounty. But the school in St. George's-fields afterwards withdrew its claim, having been instituted since the date of the will, and therefore could not fall within the intention of the testatrix.

The master of the rolls, Sir *W. Grant*, by his decree, ordered it to be referred to one of the masters, to inquire and state to the court, what hospitals for the blind and for incurable lunatics were intended by the will of the testatrix to take the benefit of her personal estate.

See ante. 276.

Upon the inquiry instituted by the master under this decree, considerable industry was exerted to discover whether the testatrix had ever expressed any wish or intention that could in any manner elucidate her expression of hospitals for the blind; but every inquiry proved fruitless. Several charitable institutions put in their claims. It was contended for Christ's hospital, that the Rev. W. Hetherington, late of North Cray, in Kent, clerk, by deed dated 29 March, 1774, being sensible of the honor and integrity, as well as the constant, generous, and disinterested attention of the governors of Christ's hospital, in discharge of the great trusts reposed in them, and likewise of the great utility of that hospital; and having considered, that notwithstanding the many noble charities that had of late been founded in this opulent and well-disposed country, very small provision had been made for, or attention paid to, persons who had the misfortune to be deprived of their sight, and were thereby rendered incapable of providing for themselves: and being desirous of establishing, in his life-time, a fund for making some additions to the revenues and income of the

the said hospital, to be applied for the general purposes thereof, and for contributing towards the relief and support of the said unhappy objects, natives of England, who were deprived of their sight; and hoping that others, whose fortunes and circumstances might enable them to be more liberal, might be induced to follow his example, and to contribute towards their support and relief, he transferred to certain trustees 20,000l. old South-sea annuities, in trust, after payment of the expences incidental to the trusts, for the benefit of the hospital, the yearly sum of 100l. and to divide the residue of the dividends thereof among such 50 blind persons, and destitute of sight, born and residing in England, at the rate of 10l. a year to each of them, being of sober life and conversation; not receiving alms from any parish or place as paupers; not being common beggars; and not having any annuity, salary, pension, estate, or income for life, to the yearly amount of 20l. as a committee of almoners should nominate as the most deserving objects, of which charity they should be partakers on the 10 day of Dec. yearly, so long as they should live and continue blind, and incapable of maintaining themselves. That several other persons had bequeathed considerable sums to Christ's hospital, as trustees of Hetherington's charity, in trust, to divide the interest in the same manner: and they now paid 450l. and upwards annually among such blind persons—none of whom were resident or domiciled in that hospital.

That there being no particular hospital in or about London, solely appropriated or denominated an hospital for the blind, and the governors having this fund to be appropriated to blind persons, they claimed a participation of the residue of the testatrix's estate.

It was also contended by the painters, or painters-

stainers' company, of London, that John Stock, late of Hampstead, by his will, dated 26 Feb. 1780, and the first codicil thereto, gave the residue of his estate and effects to the draper's company, and to the painters-stainers' company, and their successors; the interest whereof to be applied by the painters' company to poor blind persons, in such manner and form, and subject to such conditions and restrictions, as a certain charity for the relief of blind persons, known by the name of Mr. Hetherington's charity, was subject and liable to. That in Hilary term 1786, an information was filed by the attorney-general, at the relation of the governors of Christ's hospital, against the painters or painters-stainers' company, and others, for the establishment of the will of *John Stock*, and for an account of his personal estate—and that a decree had been made for that purpose. That by an order made on the hearing of that cause for further directions, in Oct. 1788, it was directed that the master should approve of a plan for the conduct and management of the charitable bequest; and that a scheme should be laid before him. That the master accordingly reported a scheme for the carrying the charity into effect with more precision, and which he set forth in a schedule; and that he approved thereof, as most precise and effectual for carrying the charity into effect, and the perpetual and permanent conduct thereof. That by a subsequent order this report was confirmed, and the scheme directed to be pursued: and that it was now carried into effect every year.

The scheme stated the income of 55000l. reduced bank annuities, at 3 *per cent.* standing in the names of the drapers' and painters' companies, amounting to 1650l. which, after deducting incidental expences, clerks' salary, &c. enabled them to distribute 1500l. yearly, to 150 pensioners at 10l. each.

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The company likewise stated, that by the will of *Jane Shank*, widow, a further sum was also vested in the same company, the yearly interest whereof was directed to be distributed in yearly pensions of 10l. each, to blind widows, or single women only: and a further sum by the will of *Dorothy Smith*, late of Mile-end, widow, deceased, for the relief of blind persons. That from all these sources the company paid 175 pensions of 10l. each. And as there was no hospital in particular appropriated or denominated an hospital for the blind, the company claimed a part of the residuary personal estate of the testatrix *Elizabeth Yeates*.

It was insisted by the other claimants of a part of the residue for institutions for the blind, that the confidence reposed in the governors of Christ's hospital, and in the painters-stainers' company, by the benefactors above-mentioned, constituted them to be trustees only, of a fund which, as their almoners, they were to distribute to blind persons, under certain restrictions. That they thereby did not offer any residence, or establish any provision for such persons, for their reception and relief, for their abiding, or for their maintenance: and that as these constitute the nature and character of an hospital, it could not be maintained that either the governors or the company or the fund could be taken by any construction within the utmost extent of the will, to be within the testatrix's meaning. No house had been either in the contemplation of the benefactors, or had been since established out of their funds; and the objects of their bounty could be deemed to stand in no other light than as pensioners, entirely distinct from any control or discipline. That the word hospital, *hospitium*, implies a locality of establishment, a place wherein strangers are entertained—a retreat or shelter—a harbour *(Plautus)*: and that all philologists

concur

coneur in defining "hospital," more properly "*spital*," to be a place, or building, endowed and supported by charitable contributions, for reception and relief of the poor, aged, infirm, sick, and otherwise helpless: and that the trustees or almoners of these bounties were in no respect within either of these definitions.

The treasurer of the school for the indigent blind, in St. George's-fields, by his answer, relinquished any claim to this bequest, on the ground that the school, though a charitable institution, did not fall within the description or intention of the will (which was dated 1794, five years, and the testatrix died four years, before this charity was in the contemplation of its founders, in 1799.

It was contended for the school for the indigent blind, at Liverpool, that it was instituted in 1791, in two houses then rented for its establishment, solely with a charitable intention, and principally for the instruction and education of blind persons; and if there were no other was intitled to receive the whole of that part of the residue given to the hospitals for the blind; but if there were others, then to a distributive part with them.

That the present school was built and occupied in 1800; but the whole plan was not then executed, for want of sufficient subscriptions, which have since enabled its directors to begin additional buildings for that purpose: and that it was very probable the testatrix might mean to aid the funds in this respect, though it was not proved that she knew any thing of it.

That the pupils were principally paupers; attended with medical and surgical skill; were received from all parts of the kingdom, but did not, until the additional buildings should be completed, dwell in the school, but lodgings were provided for them, with maintenance; and

besides

besides rewards, a weekly allowance, sufficient to enable them to defray their rent and expences, were given to them.

That several old blind persons had, from the first institution, been received and maintained; and an allowance paid to those who were, from sickness, age, or infirmity, unable to attend constantly: that this constituted the school an hospital for such old persons. And in all cases of sickness, the pupils were gratuitously attended by medical persons; and were nursed, and provided with medicines, at the expence of the school. That there were many names on the list for admission as soon as the additional buildings should be completed. And on all these grounds chiefly, this school claimed to be entitled.

It was likewise contended, in behalf of the Edinburgh asylum for relief of the indigent and industrious blind, that it was instituted in 1793, by voluntary contribution, in a commodious and suitable house on Castle-hill, solely set apart for their use and accommodation; were not supported within it, but were similar to out-patients of hospitals, who attend there daily; were allowed one suit of clothes yearly; besides medicine, nursing, and medical advice in the asylum, or in the royal infirmary; with 4s. 6d. per week, and occasional premiums, for their encouragement in industry. The institution provided the raw materials, and the manufactures were sold for its benefit. With other grounds for claim similar to those urged in behalf of the school at Liverpool.

It was also contended, in behalf of the hospital and school for the industrious blind of Norfolk and Norwich, instituted in the year 1805, that pupils were admitted to the school, and two women to the hospital, of the ages of 67 and 72 years.

That no aged person was admitted thereto until they had attained the age of 65 years; nor any one who had been

been maintained in any house of industry, work-house, or parish-house within the preceding twelve months, and had in that time received any parochial relief; and they were limited to that city and county. That as well pupils as aged persons were maintained by board and lodging, and in all cases of sickness. But as this institution (which in other respects was more within the expression of hospitals for the blind in the testatrix's will) was not established till five or six years after her decease, it could not be deemed within the extent of her intention.

The governors of *Bethlem hospital* urged their claim to part of this residue, principally on the following grounds: That the hospital called Bethlem was originally founded on the scite of ground at present occupied by the street called Old Bethlehem, by Simon Fitzmayor, a citizen of London, in the year 1247, in the 39 of Hen. III. as a religious house for the prior, canons, brethren, and sisters of the church of St.Mary, of Bethlehem; and was granted by royal charter, together with all its revenues, by King Hen.VIII. on 13 Jan. in 13 year of his reign, A.D.1547, to the mayor, commonalty, and citizens of London, as an hospital for the reception of lunatics, to which object of charity they had previously directed their attention. That it did not appear that for some time after its foundation any other provision was made for the patients then received, than confinement and medical relief; their friends or parishes contributing to their support, and the treasurer making the best terms for their maintenance. That in the year 1675, the present building was erected; and it did not appear that any distinct classification was made between curable and incurable patients, nor was any appropriation made for the two classes, until the year 1723, when two patients were ordered to be admitted as incurables; and that cells were then about to be provided for

for such patients. That both kinds were kept in the hospital from its earliest foundation; it being left to the committees to receive, continue in, or discharge both descriptions of patients, though not distinctly classed. That in 1734 the hospital was considerably enlarged, for the express entertainment of incurable patients; and in consequence of such additional room, as well as of an increase of the funds, many of those patients, who had previously undergone a course of medical treatment for one year, without effect, were continued in the hospital upon the footing and under the name of incurable patients: since which period they had been constantly supported by the hospital, with various assistance from their parishes or friends, and a great number of incurable lunatics, expressly so called, were kept in a distinct and separate part of the building; for whose relief considerable benefactions had been from time to time received; and on whose account a distinct fund had been kept.

That in 1807, a part of the building being in decay, was taken down; but the state of it had never wholly prevented the reception and support of such patients whose friends contributed 5s. weekly, and their parishes 7s.

The treasurer of St. Luke's hospital for incurable lunatics, in Old-street, likewise claimed a part of this residue, on chiefly the following grounds: That this hospital was first opened for the reception of lunatics, on the 30 July, 1751. That in 1754, the governors resolved that the general committee should be empowered to take in, by rotation, such patients as had been discharged uncured, not exceeding ten, at 5s. per week; and this number had, by several subsequent orders, been increased to 110, at the same weekly rate of contribution; and they now amounted to 105, who were deemed incurable; that the said

said hospital had been generally understood to be solely for the reception of incurable lunatics; and many legacies have been bequeathed under that impression.

It is believed that this impression has arisen from the hospital having taken in patients, who had been discharged from Bethlem hospital, not because they were incurable, but because their time had expired, and they were not recovered.

The treasurer of the infirmary or lunatic hospital, at Aberdeen, also claimed a share of this residue, urging, That in consequence of a resolution of the magistrates and council of that city, in Feb. 1739, sanctioning contributions for erecting an infirmary or hospital for sick persons, which was also to comprehend apartments for the reception of lunatics: and the corporation having agreed to apply certain funds towards the purchase and erection of the buildings, and to grant an annual allowance in aid of that part of the institution which was intended for the supporting of lunatic patients, this hospital was erected in 1740, and incorporated in 1773, by charter. That the corporation having contributed 30l. per annum, have the privilege of recommending five lunatics, to be maintained during life. That this fund has been since augmented, by a benefaction of Daniel Cargill, distinct from that fund which is applied to sick persons. And it was provided, that as soon as the fund should be equal to the expences of a separate building, for the accommodation and maintenance of 12 or more patients, such building should be erected in the vicinity of the hospital, increasing the corporations right of recommending patients, provided they be in indigent circumstances. That they were afterwards enabled to undertake a building on a more extended scale, which was finished in 1800; whereto all the lunatic patients in the infirmary were removed.

removed. That ever since the first establishment, in 1740, lunatic patients have been received, who were in indigent circumstances, without the means of care or protection, who were deemed incurable, and were not discharged at the expiration of any limited time, but were retained in the hospital as an asylum for life, and maintained solely by its funds. That those who were by any means able to pay 15l. each annually towards their maintenance, were received into the hospital, whether deemed incurable or not; and that the funds for this purpose were kept distinct from those of the infirmary.

The master by his report stated, that not having received any evidence that the testatrix had in view at the time of making her will, any particular hospital for the blind, and for incurable lunatics, as the objects of her bounty, he conceived her bequest to have been meant generally for the benefit of all hospitals and charitable institutions for the relief of the blind, and for incurable lunatics: and therefore that the claimants, except that for Norwich, which was founded ten years since her death, viz. the governors of Christ's hospital, as trustees of Hetherington's charity; the school at Liverpool; the Edinburgh asylum; the painters' company, as trustees of Stock's charity; St. Luke's, Bethlem, and Aberdeen lunatic hospitals, were entitled, under the bequest, to take the clear residue.

Easter Term, A. D. 1809.

I believe this is the last case upon the uncertainty and ambiguity of a charitable bequest, and must rather be deemed an instance of a strong construction in favour of charities, so far as affects that part of the residue which was given to the blind. It is certain that hospitals are charitable institutions; but there are many of the latter which cannot be said to be hospitals, and such it may be presumed are Christ's hospital, and the painters-stainers' company,

company, which are merely almoners, or trustees for the distribution of annual pensions to blind persons, not domiciled under their jurisdiction.

This cause was not set down for further directions when this part of the work was in the press.

A question has been made, with some air of importance, whether the title of *governors* is a proper legal description, so as to entitle a charity to a legacy bequeathed "to the governors" thereof, except the case of the governors of Queen Anne's Bounty, whose charter has given the society that name.

It must be admitted, that this stile seems to constitute them into a society, when perhaps they are not incorporated; or if they are, it is by some other designation. But though it is at all times desirable to use the right name in any bequest, yet there can be no danger of the legacy failing in this respect, for it sufficiently speaks the testator's intention; and though the court might be inclined to favour the next of kin, or residuary legatee, yet it has been shewn in the foregoing pages, how uniformly the rule has been adopted in favour of charitable bequests of personal estate, to maintain them, if the charity and the intention appear.

But to avoid any doubt, or the probability of litigation, it is the safest way to bequeath the legacy to the "treasurer of the charity intended, for the purpose of carrying on its benevolent designs."

In addition to the preceding determinations in cases of uncertainty and ambiguity, the following prescribe the rule, when there happen to be no objects who are entitled to the intended benefaction.

2 Freeman, 40. 1678. An annuity was intentionally bequeathed to charitable purposes, which were by law adjudged to be void uses, the

the court gave the charity to such persons as the Bishop of London should approve, for expounding and catechising on every Saturday—following the precedent of an earlier case, wherein the court had decreed a pension, bequeathed to silenced ministers, to be paid to poor conforming ministers. Lane's Rep.

The owner of land, charged with an annuity for the payment of a school-master, was not excused from that payment on account of there not having been any master for six years past; and the court declared that the land could not be discharged therefrom, although there were not persons in the parish sufficient to answer the description of the charitable bequest. 2 Atk. 238. Ayles v. Dodd, 1741.

The Hon. *Robert Boyle*, by will dated in 1691, directed the residue of his *personal* estate to be disposed of by his executors for *such charitable and pious uses as they in their discretion should think fit*, but recommended to them to lay out the greater part thereof *for the advancement of the Christian religion.* The executors had invested a considerable sum in the funds, with a view to purchase lands for the purpose, which had since been done under a former decree, which directed the lands to be conveyed to the city of London, in trust, to pay part of the rents to *Trinity* college, *Oxford*, whereof Mr. *Boyle* had been a member: other part for the propagation of the Christian religion among the infidels in Virginia, as Lord Burlington and the Bishop of London shall appoint.—The rents amounted to 300l. *per ann.* and upwards. Timber was afterwards cut down and sold, under the sanction of the court, which with accumulations of interest, produced 13,849l. 2s. 10d. in 3 *per cent.* consols. Mich. Term, 1790. Atty-gen. v. City of London. 2 Br. 171. 1 Ves. jun. 248.

The dissentions between England and America began in 1775, and continued till 1783—when America was

No objects.

declared to be an independent state. In 1782 all remittances for the use of this charity in Virginia ceased—and an information was now filed, praying that the rents and arrears, and the stock purchased as above-mentioned, might be applied in some other manner for the propagation of the Christian religion in England.

It was urged that this court could not now look to the application of any money paid to the colleges in America, to whom it had been remitted for the purposes of the will. Although they had a charter from William and Mary, they cannot now be considered as a corporation—a corporation is a creature of the great seal, and as such they have ceased to be a corporation. They claim as trustees; but cannot be considered as such, when the money paid to them would be out of the control of the court.

On the other hand it was answered, That the revolution has not rendered them less amenable to the jurisdiction of the court than before, as they could then only be brought voluntarily before the court.—The college appeared under their seal.—Their claim, as such, is preserved by the treaty of peace, by which every right of every corporation is left as it was before, the treaty only recognising the independence of the government. Even in conquered countries, the situation of permanent bodies remains the same as it was, till altered by the conquering power. Thus, after the conquest of the English provinces in France, there were several convents in them that had lands in England; and though the convents became subject to the kings of France, their English lands, although during the time of the war they were seized into the king's hands, yet in time of peace the convents enjoyed the rents thereof; till the time of Henry V. when the lands were taken into the king's hands. If the

trusts

trusts do not subsist, the lands would escheat to the crown.

Lord-chancellor *Thurlow*, during the argument, said, he could not see how the bishop's bill was to be sustained: he is only a trustee as to the mode of administration of the charity, and has not therefore any interest to sustain a bill. With respect to the college, suppose they should misbehave, where is the sci. fa. to be brought? Suppose a conquest *in regem*, the law would be the same, but the sci. fa. could never be brought in the court of the conquered king.

After the argument he said, That the trusts to the corporation to convert neighbouring infidels ceasing for want of objects (there being then no neighbouring infidels) the charity must be applied *de novo*. As to the other parties, he could not now consider them as corporations; therefore he referred it to the master to produce a plan for the application of the produce of the estates, according to the testator's intentions; and ordered the costs of the college to be paid to their agents here.

But I rather pass on to some modern cases, wherein the questions arising upon ambiguity and uncertainty of expression in bequests of this nature, have been more fully considered, and in which the doctrine of application of the charity-fund, *cy pres*, has been effectually established. Some of these cases I could not venture to compress, without injustice to the decisions.

Mary Wilks, by will in 1800, after devising and bequeathing several estates and legacies, gave all the remainders of her different bequests to the archbishops of Canterbury and York, for the time being, in trust, for charitable purposes; and any thing not specified, she committed to the discretion of her executors, whom she directed to make some donation out of her property to

14 Ves. jun. 364. Paice v. Abp. of Canterbury. 1807.

No objects.

the poor of the different places where she had estates. And she gave an estate in Lincolnshire to H. T. his heirs and assigns for ever. "And I also give and bequeath to the said H. T. my farm and manor of Eythorne, in the county of Kent."

The questions upon further directions were, first, as to the general residue, whether it passed to the archbishops for charitable purposes, or to the executors, under the words *any thing not specified, &c.* or to the next of kin, as undisposed of.

The trust for charitable purposes was confined to the reversion of certain particular interests specified; which the executors took by law, to be disposed of as they should think proper, under the direction expressed as above stated. And it was contended for the next of kin, that the bequest for the charitable purposes was limited to interests in remainder of the specific bequests, and did not embrace the general residue: that the expression, "commit to the discretion" of the executors, does not import gift; but, on the contrary, that they are not to take for their own benefit; and consequently no object being pointed out, they must be trustees for the next of kin.

Lord *Eldon* declared void all real estate devised to charity, and personal estate connected with land, as leaseholds and mortgages. As to the farm and manor at Eythorne-court, the reversion was either intended to be given to the archbishops, or to the executors, or it must go to the heir. He said, it was very difficult to say it was not intended to go to the archbishops; if the technical construction of the term "remainder" is to be adopted; and then it is ill given: the object of that disposition being charity. If it was intended to go to the executors, but not for their own benefit, it must result

to

to the heir-at-law, as it must if not disposed of. The only question upon this devise is, whether the word "*also*" has precisely the same operation as the addition of the words "his heirs and assigns, for ever," in the devise of the other estate immediately preceding. Upon reflection, he believed the court of King's Bench had gone as far in the construction of the word "also" as was contended; it seems to him that all the old rules against disinheriting an heir, except by plain words or necessary implication, are gone, if such a construction is to prevail: he therefore thought that this devisee took an estate for life only in that farm.

The next question was, whether two residues were constituted by the will; besides the general residue, the remainder to the archbishops of the different bequests; or whether they took the general residue, with a discretion given to the executors in certain cases: but the manner in which that discretion was to be exercised, not prescribed. There were words and peculiarities enough in the will to create much perplexity; but he thought it was a will that did not give the general residue in such a way that the next of kin or the executors could take it: and if the question was between the executors and the next of kin only, there would be great difficulty in saying the executors themselves should not take it; for no case has gone the length of holding executors to be trustees for the next of kin, under a bequest for such purposes as they shall in their discretion think fit. If, as in the case of the *Bishop of Cloyne* v. *Young*, the testator declares that he gives it in trust, and then does not declare the trust; or, as in *Morice* v. *Bishop of Durham*, the trust declared fails, the executors being clearly intended not to have the benefit, must be trustees for the next of kin: but there are many authorities that a bequest

2 Vezey, 91.
9 Ves. jun. 399.
10 Ves. jun. 522.

No objects.

quest to A. for such purposes as he shall think fit, is a gift to himself—that must always depend upon the particular terms of the will.

The first observation upon this will, though not conclusive, is always considered a circumstance of intention: that the testatrix in the beginning declares the purpose to dispose of all her real and personal estate and effects whatsoever, of which she may die possessed. All her devises are bequests; she never uses the term *devise—the remainder after specified* is frequently used—nothing is afterwards specified as a remainder, but the remainders of the different bequests to the archbishops and others; and the same expression was used relative to a stock legacy.

There is great difficulty in ascertaining what she meant by the words "any thing not specified, I commit to the discretion of my executors;" but a construction was called for beyond what was ever desired, viz. that she meant to give all the residue of the real and personal estates, except the reversion of the estate devised to H.T. for life, to her executors, not for their own benefit, but for the next of kin; that, as it was left to their discretion, they were not to exercise any discretion; and it was an intestacy as to all that was not included in the remainder to the archbishops. I am authorised, said his lordship, to find another construction; from the great anxiety of this testatrix not only to give her legacies, but in the first devise to point out the manner in which every thing is to be done; in short, every thing necessary to effectuate the purposes mentioned, she commits to the discretion of her executors. That construction, though forced, is much more authorised, than that the general residue is not comprehended in the words of the gift to the archbishops. Therefore, after the donation to be made

made by the executors to the poor, the extent of which is almost unlimited, the general residue is to go to charitable purposes; and must be the subject of a scheme before the master.

Where a bequest is to charitable purposes, the disposition must be in that mode; but where the object is charity, without a trust interposed, it must be by sign manual; that is the distinction adopted in *Moggridge* v. *Thackwell*, (*ante.* 253).

SECTION X.

Of the Doctrine of Cy Pres.

The doctrine of Cy Pres.

The result of the doctrines already established has given rise to a principle in the court of equity, which eminently marks the liberality of that court: for if the testator has expressed his intention with such ambiguity as that no precise rule can be laid down for executing it, or if objects are wanting to receive his bounty, the court will take every practicable means to carry his design into effect, as *nearly* as it can be constructed. The principle which governs all these cases is, that presumptions are to be made in favour of a charity. *Pickering* v. *Lord Stamford.* Thus, a legacy was devised "to the poor," and the testator being a refugee, the court gave it to poor refugees.

2 Ves. jun. 380, 384. Ambl. 422. Atty. v. Clarke. 1762.

A trust of real estates, created by deed in 1653, to establish a habitation for the vicar of the parish, and for maintaining, in a school-house to be erected, a master and mistress to teach the children of that parish. The trustees acted upon a declaration without date or signature,

2 Ves. jun. 380. 1794. Atty. v. Boultbee.

Cy Pres.

but known to have been written by the donor, whereby they were directed to recommend a parson. One of the trustees informed the chancellor of the death of the incumbent, and desired him to wait a short time for their recommendation. His lordship waited two months, and then presented: they refused to admit him, and filed their bill at the relation of the vicar. Their delay arose from the absence of one of them.

The master of the rolls, Sir *R. P. Arden*, established the declaration as conceived and acted upon by the trustees, as contemporary with the constitution of the trust. By the first instrument every thing was left at the discretion of the trustees, except the habitation of the minister; and he was to have only such portion of this charitable gift as the trustees should think fit—he had a right to give these estates as he should think fit. He has first marked out a general charitable purpose, then directs this specific application of part, subject to the proviso; and if there is no such approbation of the trustees, then to some other charitable uses. The absence of a trustee was no ground for the delay.

As to the doctrine of *cy pres*, as applied to charities, this sensible distinction has prevailed; the court will not decree execution of a trust of a charity in a manner different from that intended, except so far as they see that the intention cannot be executed literally—but another mode may be adopted consistent with the general intention, so as to execute it, though not in mode, yet in substance. If the mode becomes by subseqent circumstances impossible, the general object is not to be defeated, if it can be obtained, as in *Attorney* v. *Goulding*—but the court has said, where the general intention may be executed, it shall. In the case of *Brantham* and *East Bargold*, the testator directed bread to be distributed to poor persons

persons attending divine service, and chaunting his ver- Cy Pres.
sion of the psalms: they could not be chaunted, because not authorised. But I thought his general object was to give the poor people the bread, and the chaunting the psalms was only accessary, because he thought his version as good as any other. Apply these principles to this case, Sir F. Nethersole had two objects; the first was a general charitable object, and very proper; an anxious desire to provide what he specified in his declaration, what he thought a competent maintenance for the vicar. There was also another object. The question is, whether that was equally important, and was annexed to the first, so that they must stand and fall together. It was to secure to himself and his trustees the recommendation or approbation at least of the person nominated. If both these purposes can be effected, they ought, &c. &c.; but they have not done all they ought. I do not believe they intended to defeat the testator's bounty; but they had it in contemplation to make this recommendation when it suited their convenience—that is the degree of negligence. It was said for the defendants, the crown ought to have waited six months: that is, to convert them into patrons. They have only the nomination to the great seal, and must give the chancellor notice, for he is responsible for the person presented. The six months are with respect to a real patron. He loses his presentment if he does not present in six months after the death, not after the notice. The chancellor waited two months, and they permitted the presentation to be followed by institution; the person giving up his other prospects in life, and coming into the parish. It would be extraordinary if this should disappoint the material object, and this person should not have the benefits intended for the vicar. Under the circumstances this court may over-look them, and think

Cy Pres.

think him entitled, though the condition is not complied with.

The court will not permit the general intention to fail for want of circumstances annexed, in which the fault or neglect of the parties cannot take effect. Therefore this vicar was decreed to be entitled to the benefits intended, not upon the idea, that if the trustees had recommended in proper time, and that recommendation had not succeeded, that then he would have been entitled; but upon this, that the general object was, that there should be a good minister; and there was a secondary intention, that he should come in with the approbation of the trustees. The question is whether under these circumstances, I do not answer his intention better by giving this benefit to the vicar, though from the unfortunate neglect of the trustees, he came in without their recommendation. I am of opinion they ought to have taken more pains than they did, and their neglect shall not defeat the general intention. Afterwards referred to lord-chief-justice Eyre, and lord-chief-baron Macdonald, and confirmed.

3 Vez. jun. 220. 1796.

3 Vez. jun. 141. Atty. v. Whitchurch, 1796. Rolls.

A devise of four alms-houses and stock, the dividends to the four persons intended to dwell in them.

Master of the rolls said, It was contended that, although it must be admitted that the gift of the four tenements is void, yet the other part, so far as it concerns the stock appropriated for the maintenance of the poor persons, may be supported, as not being essentially connected with or belonging to it, but as denoting a general intention, which, though the rest fails, may remain and be fulfilled.

With regard to the principles upon which this court has administered charities, where the same cannot be carried literally into effect, I refer and adhere to those principles which I laid down as the rule by which I conceive this court ought to govern itself, in *Atty.* v. *Boultbee.*

Ante. 168.

bee. A charitable bequest cannot be defeated by the negligence or default of the person to administer it, or by the impossibility to give effect to every circumstance. If the general intention appears consistent with the rules of law, and not against the mortmain act, it shall be carried into effect, without regard to the secondary objects, which the testator might have intended. The doctrine of *cy pres*, which has been so much discussed in this court, and by which I meditated the rule to execute the charitable intention as nearly as possible, however wildly and extravagantly it has been acted upon in former cases, is by late decisions, particularly since the statute, administered in this way. The court will not administer a charity in a different manner from that pointed out, unless they see, that though it cannot be literally executed, another mode may be adopted, by which it may be carried into effect in substance, without infringing upon the rules of law. If the mode becomes impossible, the general object, if attainable, shall not be defeated. Therefore, though I agree with Lord *Northington* in *Atty.* v. *Tyndal*, that this court is not to study to evade the statute, with that restriction I agree with Lord *Hardwicke*, in whose time the statute passed, and to whose decisions upon this statute and upon all other points I shall pay the greatest respect. At the same time I must admit, that the authority of *Atty.* v. *Bowles*, has been shaken by subsequent authorities; and it is not one of those decisions of his that I can entirely concur in; I mean that part of it, where, admitting that the object was to erect a building upon land not then given, he throws out, that if land should be afterwards given, the statute would not be evaded by applying the money to erect a building upon it. That is giving land in mortmain; for it is another mode of purchase, and holding out a temptation

Cy Pres. 1 Vez. jun. 380.

Amb. 614.

2 Vez. 547.

to

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to people to give land. Therefore the doctrine that I consider established by Lord H., and that has not been shaken, is this: that where the testator has pointed out two modes, the one consistent with the statute, the other inconsistent with it, the court will adopt that which is legal, and will carry it into effect; but it is necessary in all these cases to see whether the testator has given such an option, and there is an ultimate object, consistent with the statute or not. It remains to apply these principles, to see whether there is any intention to give this fund to the general purpose of providing for poor men and women, independent of the alms-houses, or whether the endowment only is proposed by the appropriation of part of the interest to that. In that view, it must be admitted that it must fail. The *Attorney* v. *Goulding*, is precisely in point. I believe I may have intimated a doubt upon that case: I thought it a more rigid construction of the rules of the court upon charitable bequests, than in prior cases had been adopted. Upon consideration of that case, I agree that it is right: but I do not agree with what Mr. *Justice Buller* is stated to have said, that the rule of the court to execute the charitable purpose in another way had been varied. I perfectly agree with the rule laid down; but I deny that it has been varied; nor was it necessary to support that decision, that it should be varied; for the ground of it appearing in the report, is, that applying the charity to any other object, would be contrary to the intention. The decision of the case does not prove any variation of the rule laid down. It is extremely material that the principles of the case upon charities should be fixed and determined; therefore I am very desirous that the principles upon which I decide this case, and concur in *Attorney* v. *Goulding*, may be known.

Ante. 121, 167, 189.

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It is said an intention to give this provision to any poor men and women may be collected. If I could collect that intention I would execute it; but I cannot; and so it is not enough to say, it is not inconsistent with that intention; or that if the testator could have foreseen the failure of his object, he would have given it to poor men and women, without regard to the houses. Perhaps he would; but can I judicially pronounce that he would; or (for such is the office of a judge) can I fairly infer that he would upon this will? I cannot. An endowment, with a restriction as to another wife or husband; an endowment, where the conduct of the parties is under the control of the trustees, is very different from a charity for poor men and women in general. I cannot create another charitable object for him, or apply this to any different object, so as to be warranted in saying I fulfil the intention. Cy Pres.

I think the doctrine laid down in *Attorney* v. *Goulding*, so explained, is fortified by Lord *Thurlow*, in some case before him; and *Blandford* v. *Thackerell* is an authority for that decision, as well as for that which I am about to make in this case. It might have been argued there, as it has been here, that if it could not take effect by a permanent establishment of a school, it might by paying a school-master or mistress to teach poor children at large; therefore it might be established in that way, without regard to the particular direction; but the lord-chancellor did not think himself warranted in collecting such an intention. Ante. 126. 159.

Therefore, without shaking any rule laid down, except that part of *Attorney* v. *Bowles* that I have mentioned, I am warranted in declaring, that under the true construction of this will, the intention was to make an endowment of alms-houses, that there is no general intention Ante. 166.

Cy Pres. See 1 Vern. 248, and note. 2 Vern. 266. 3 Vez. jun. 220. 8 Vez. jun. 633. 646. Atty. v. Andrew, 1798.

tion beyond that; and therefore the bequest, so far as it concerns those alms-houses, must fail with the object to which it was attached.

Dr. Andrew, by will 1747, directed, that as soon as a suitable purchase of freehold estates might be met with, all his 3 *per cents.* should be sold and invested therein, in trust, after decease of some relations, to whom he gave life-interests, to the use of Trinity college, Cambridge; and that the lands should be vested in the college, which by license of mortmain they were enabled to take: and then directed four scholarships to be founded from merchant-taylors' school; and desired the master of the college to assist in purchasing the estate, with the approbation of the college, that the same might be settled according to his will, &c.

The funds having never been laid out in land, the master of merchant-taylors' school filed their information against the college, and the executor of the heir-at-law, for performance of the trusts; and if it should be determined that they were not bound to accept it, that the funds should be so disposed for the school, as should most nearly correspond with, and effectuate the charitable designs of the testator.

The funds were transferred to the master, &c. of the college, and heir-at-law, and held in trust for the life-interests, under a declaration of trust; and those persons had received the annual income for their lives, except a small part which had been paid to them. Upon the decease of the longest liver, they desired to renounce the trusts, and refuse the bequests, being satisfied that they could not accept them, without great prejudice to their college; and submitted that the acts they had done were only in performance, and not in acceptance of the trusts, of which they had given notice to the relators.

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Lord-chancellor *Loughborough* held, that they had done nothing to conclude them as an acceptance of the bequest. They put themselves in the trust of the money, but no farther. Upon the deed, nothing more was intended than merely to secure the property. It was not quite clear that if the college refused, the will was void: because being a college, the statute of mortmain does not affect it; then it is a bequest for a given purpose, which purpose cannot take effect; whether there can be any mode of executing it *cy pres*, or whether, if there is no use that I can execute, I must give it to the representatives. Cy Pres.

I may modify the objection, by permiting even fewer persons than the testator has proposed to be brought in. If not, the testator must be taken to have meant the benefit of a college; and rather than the charity should fail, I must try if there is not another college that would become the trustee upon the terms proposed. The college was competent to accept or refuse, or suspend their decision. They have gone all the length except the final execution, to have invested themselves with all the fund. After deliberate consideration they executed the deed, by which nothing was done but this, for the preservation of the fund, for preventing an immediate suit as to the application, and to have brought on a decision upon the effect of the bequest, they joined themselves with the executrix *qua* trustees. By these means any dilapidation and accident to the fund was for a time prevented. After stating the trusts of the deed, his lordship added, Ought I to infer from this, that they had decided to take the benefit of this bequest, and in consequence of that decision, to execute the purposes of the will? Supposing them to have frankly accepted, their duty was to have done what this court would inevitably have directed, to have sold the stock, to have found out a purchase, and

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to have invested the fund in the purchase of land. The rents and profits would have gone to the relations of the testator during their lives. The effect would have been, that they would have sold all the funds at *par*, or rather above *par*, and they would have bought land at 24 or 25 years purchase. Instead of that, the fund, remaining stock, the whole dividends, were received by the persons entitled for life. They have received 1-5th more than the testator intended, by collusion with the executrix and the persons who conducted this affair on behalf of the college: it is such a dealing with the will, that I would never suffer a devisee, nor a trustee, to practise: but they placed themselves in that neutral state, no person calling upon them to make an option. Perhaps to call upon them immediately would have been more than the court would have done under these circumstances at that period; when there were no ready money funds, no actual estate. I doubt much whether the court would have called upon them at that moment, to decide whether they would accept. Perhaps the court would have sold the stock, and would have directed an account, and cleared the fund; reserving the question as to the election, to be considered under the existing circumstances when the fund was cleared; for the circumstances under which the college might have then found themselves, would have made a material ingredient, to which the court would have been bound to give some attention. Therefore I cannot hold that they have made an absolute definitive election to accept this trust; but undoubtedly they accepted the administration of the property, and are accountable for all that came to their hands: but I go a little farther; for I think while all things remained embarrassed, it would have been much too strong for the court to have said there was not room for the present

members

members to review the decision their predecessors had made, and to desire not to be compelled to abide by it. It is an infinitely more favourable case than that of the Duke of *Montague*. The acts done have been a prejudice to nobody. No injury has been done to any person. There is no ground, therefore, upon which I can, as applying myself to the consciences of the gentlemen of the college, controlling their judgment, state to them, that, whatever may be their opinion upon the inconvenience of it to the college, they are bound in conscience to put themselves to the inconvenience, and the college under what they conceive a disadvantage, upon the acts done so many years ago by their predecessors. Their answer in conscience is, here are all the funds: what interest we have received, here is an account of; it will go into the fund; but we desire to stand clear of any disposition to be made by the intention of Dr. *Andrew*; thinking they did not mean to bind themselves—but that their whole acts amount only to this, that they took a step engaging themselves to nothing but to act fairly and honestly as trustees, with regard to the trust fund. Cy Pres.

As to the other part of the case, it is not fit to decide upon it, without giving an opportunity to state any proposal with regard to this charity. I have not looked at all the cases referred to. Some of the cases seem to have gone the length of raising an idea that the doctrine of *cy pres*, as to charity, ought never again to be mentioned in this court. I am not quite clear of that.

This case, the devise being for a college, is quite clear of the mortmain act. It is not affected at all by it. The purpose of the testator is clearly out of the provision of the statute. Its being to be laid out in lands makes no difference. It does not fail either from any imputation that can be cast upon the intention of the testator; for

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he was not devising any folly impracticable in itself. All could be done if the college would have accepted it. The execution of his purpose for a charity, directed to a course of education, is frustrated by events contingent and quite independent of the purpose; as if the trustees, according to whose discretion a charity was to be adopted, had died. It is fit to see what sort of proposal can be stated upon it. It would come near the purpose if Trinity-hall would not admit them as fellows, but were willing to let them stand as exhibitioners. That would be near the purpose of the intention. I do not know that it would wander very widely from the intention, if any other college was disposed to receive fellows so well endowed as these fellows probably will be. What I proposed to do was, to dismiss the information, so far as it prays that the college may be bound by the directions of the will, with regard to the establishment of laying out the money upon buildings, and providing for the addition of four scholars to be fellows; to direct an account of the money received by the college; to direct the college to transfer the stocks; the turnpike security still remaining out; the bond to be deposited with the master; and the interest in arrear upon it received by the college to be paid in: all parties to have their costs out of the estate; reserving further considerations until after the master shall have made his report; directing him to receive any proposal made to him on the part of merchant-taylor's school, for the establishment of a charity within the terms of the will of Dr. *Andrew*.

If they confined the means to lay a proposal of an establishment with regard to the four scholars, such number of scholars as they think that school will afford, I should wish to have a particular object for my consideration, whether that object is so near the intention

intention that I can execute it—and decreed accordingly. Cy Pres.

The lord-chancellor during the argument mentioned the case, something similar to this, of *Attorney* v. *Baliol College*, before Lord Northington, where not a doubt was entertained of transferring the exhibitions to another college.

The decree was affirmed on appeal by the house of lords, on the 20th Feb. 1800. 7 Ves. jun. 228.

The accounts having been settled, the company and the residuary legatee compromised the suit, on terms that a part of the funds should be appropriated to the establishment and maintenance of certain scholarships or exhibitions for the study of the civil law in St. John's college, Oxford; which college is connected, by the terms of its foundation, with the company; they having a right of sending scholars from their school to that college, who on admission become scholars, and succeed to fellowships of that college: and the college acceding to that arrangement, articles were executed 6th Feb. 1801, whereby part of the funds were thus appropriated for six scholarships, and the rest to the residuary legatee *Andrew*, who now filed a fresh bill to have those articles confirmed. It stood over till after the decision in *Moggridge* v. *Thackwell*. And then Sir *Wm. Grant*, master of the rolls, doubting whether this could be done consistently with the decree; whether this arrangement carrying it from Cambridge to Oxford is an execution *cy pres*: the company were desirous of waving any proposal beyond this compromise, which carried into execution the intention as far as could be done; as this college was connected with the school, and no other college would accept it with this condition annexed. And in the case of *Wheatley church*, Lord Kenyon was of opinion they were Atty. v. Bp Oxford. 4 Ves. jun. 431. Corbyn v. French.

Cy Pres.

were competent to agree among themselves, as to what should be applied; and, therefore, upon the attorney-general's consent, the decree was made.

9 Ves. 325.

In 1804 another bill was filed by the heir-at-law against the college for the interest of the funds, and for their legacy of money and plate. But this was dismissed by Sir *W. Grant*, master of the rolls, on the grounds that the moment the court had determined that Trinity-hall had not become bound by the acts done to carry into execution the trusts of the will, it necessarily followed that they were to account for the trust-funds that came to their possession. It became a matter of doubt by their rejecting the trust, who would be ultimately entitled to those funds; for that rejection created a question between the attorney-general and the next of kin, whether the funds were to be applied to some other charity; or whether the trust entirely failed; so that the next of kin were entitled. Nevertheless an account was directed against the college by the decree; for whatever might be the ultimate right to those funds, it was fit the college should account. Their right to retain the funds was certainly at an end. The court did not determine finally who would become entitled to the funds; for it was not understood that the effect of the decree was a decision in favour of the attorney-general, that the funds must at all events be applied to some charity. The lord-chancellor reserved that point until he should see some specific proposal; for it might depend very much upon the possibility of framing some proposal, of such a nature as might carry into execution the specific intention, whether the attorney-general might or might not become ultimately entitled. If no proposal could be framed that could possibly be held a *cy pres* execution, then it might be intended that the next of kin might become entitled. If the

the proposal so nearly corresponded with the intention as to be properly a *cy pres* execution, it might have been executed. At the same time the decree as made was rather *prima facie* in favour of the attorney-general; for it directed a proposal to be made, recognising rather the right of some general charity, than that of the next of kin. The attorney-general, therefore, remained interested in the prosecution of the suit. He was a party interested in the account directed against the college. The attorney-general might have insisted that the college should be charged with interest, or that there should be an inquiry what use they made of the fund. Neither point was insisted upon by him—the decree, therefore, was only for an account of their receipts. Cy Pres

Then the decree not directing interest, or an inquiry whether any interest was made by them, in that situation, the above-mentioned compromise was obtained. If I had ever had to pronounce upon the question reserved, I should have had great difficulty in devising any *cy pres* execution, so far as this was intended for the benefit of Trinity-hall. On the other hand, it is hard to say it should fail, so far as it was intended for the benefit of the merchant-taylors' company. A *cy pres* execution as to that might easily have been framed. As to the other, it would be very difficult. Probably it was upon some such consideration that the attorney-general thought fit to enter into the compromise; the principle of which was, to get a degree of benefit to the company, but to relinquish all claim in favour of any charity in the place of Trinity-hall.

The next of kin were completely bound by every thing the attorney-general was bound by; and he never could have affected the decree for an account.

As to the legacy of money and plate, the court held

Cy Pres.

this could not be compared to election, which takes place where one legatee insists upon something by which he would deprive another legatee of the benefit to which he would be entitled if the first legatee permitted the whole to operate. It did not appear that any legatee here was disappointed by this claim, and their refusal to accept the bequest upon certain conditions. No one could call them to elect, either to accept the trusts, or give up their legacy. The next of kin surely had never any right to call upon them to make such election.

4 Vez. jun. 515, &c.

Thus it was compared to an implied condition to submit to the burden, taking the benefit; and to the case of executors, who refusing to execute the trusts, shall not have the legacy; for that is taken to be given in consideration of the execution of the trust. But it was clear this testator had not the least conception of imposing a burden, so far as he made a bequest to them as a college, though he did conceive he was imposing a burden upon particular officers; and therefore he gave them particular legacies as a compensation for that trouble. As a college he conferred upon them what he conceived to be very particular benefits: he had no idea of their hesitation to accept them; a great property, for the purpose of augmenting their buildings, and their fellowships, and scholarships. It was never laid down that because you refuse one benefit by a will clogged with some burden, therefore you are to be deprived of another benefit by the same will, unclogged with any burden.

Suppose a bequest to me of a house to live in it, and afterwards in the same will a bequest of 100l. and I find it inconvenient to live in the house; there is an intention of benefit to me, intending to give me more than I find it convenient to accept of; but that shall not deprive me of

of the other benefit. There was no more ground, therefore, for this second demand than for the first. Cy Pres.

The bill was dismissed, but without costs.

A question has not unfrequently been raised relative to the disposition of any increase of the revenues of estates devised to charities, whether such increase was not a resulting trust for the heirs at law, or whether the devisees were entitled to them, or in what mode they should be applied. The resolutions adopted in the case of *Thetford school* have formed the basis of the doctrine established, and since recognised on the subject. See ante. 140, 137, 187.

Where the rents and revenues of a charity increased, it is the most equitable measure to employ that increase in augmenting the benefits of the charity to the objects of it, as by increasing the stipends of preacher, schoolmaster, &c. of a school; or by expending it for the better maintenance of a greater number of poor, whereby the founder's intention is fulfilled, by the more effectual performance and increase of his work of piety and charity: for it is evident that his design was, that the whole should be employed therein, and that nothing should either revert to his own heirs, or be converted by the devisees to their own use. 8 Co. Rep. 130. Poph. 6, 7. Moor, 594. Cro. Eliz. 308. Duke 78. 10 Co. 30.

For it is to be considered, that if the revenues were to decrease, the objects of the foundation would suffer in proportion; and therefore they alone are entitled to the benefit of any increase, *pari ratione*. And this is the more reasonable in ancient foundations, where the allowances and the value of land corresponded, and were probably calculated by the founder to correspond: but since which time the price of every necessary of life, as well as the value of land, have greatly increased, and therefore the allowances should be augmented with the

Cy Pres. increase of the revenues. *Ita semper quod pia et celeberrima voluntas donatorum in omnibus teneatur et exSt. Templariorum, 3 Co. 131 pleatur & perpetuo sanctissime perseveret.*

4 Ves. jun. 11. Atty v Minshull. 1796. A devise in 1719, to bind out apprentices and give clothing to poor persons: the court increased the fees and the clothing, because there were not enough applicants to exhaust the whole fund, and ordered the augmentation to continue until that should be the case; and referred it to the master to consider of a proper augmentation, and to inquire the value of the estate.

7 Ves. jun. 340. Ex. Pte. Jortin. 1802. So an increase of the revenues of a charity was ordered to be applied for the benefit of the charity, by increasing the distributions.

1808. Rugby School. And upon these principles the court very recently increased the buildings, the number of exhibitioners, their stipend, and the master's allowance, in the case of the *Rugby school.*

Rugby school was founded by Lawrence Sheriff, a native of Brownsover, a village in Warwickshire, near to Rugby: he was a baker and freeman of the grocers' company of London.

By deed, dated the 29th of July, in the ninth year of Queen Eliz. (inrolled in Chancery) he gave the parsonage of Brownsover, and a freehold house in Rugby, to trustees; and by another deed, declared the trusts to be, "with the profits of these premises, and such other monies as he should give by his will, to build near to his house in Rugby, a fair and convenient school-house, in such sort as to the discretion of his trustees should be thought meet; and to cause an honest, discreet, and learned man, being a master of arts, to be retained to teach a free grammar-school, in the said school-house; and that for ever there should be a free grammar-school kept within the said school-house, to serve chiefly for the

the children of Rugby and Brownsover; and next for such as were of other places thereto adjoining." By a codicil to his will he bequeathed to his said trustees one-third part of his freehold estate in the county of Middlesex, which consisted of a close of pasture called "Conduit close," in Gray's-inn Fields, upon such trusts as he had declared with respect to his parsonage of Brownsover, and house in Rugby; and by a writ of partition, under a decree of the court of Chancery, a proportionate part of the Conduit-close was allotted to the trustees of the charity. Cy Pres.

In the year 1748, 21 Geo. II. the school-house at Rugby having, by length of time, become so ruinous as to be incapable of effectual repair, the trustees applied for and obtained an act of parliament, by which they were enabled to borrow a sum of 1800l. on mortgage of the Middlesex estate, and with this sum to purchase a new-built house, with grounds, in Rugby, (which was then on sale) and thereon to erect a new school.

Under the authority of this act, the trustees borrowed 1800l. of Mr. Alexander Hume; and the treaty for the newly built house going off, they purchased the manor house, and several closes adjoining, in a more convenient part of Rugby, being the scite of the present schools; and, with a further sum of money advanced by themselves, built the largest school, having a circular projection towards the close; and at intervals other school-rooms and offices were added.

In the year 1777, the income of the trust-estate was found to be insufficient to discharge the current annual expences of the school, with the interest of the debt which had increased, by converting the interest into principal at the end of every four years, according to the terms of the mortgage to upwards of 5000l.; but the trustees,

Cy Pres. tees, expecting a large increase in the income of the Middlesex estate on the expiration of a then subsisting 17 Geo. 3. c. 71. lease, applied again to parliament, and obtained an act, by which a succession of trustees was provided for; and they were authorized, by a sale of part of their Middlesex estate, and by other means, to raise 10,000l. and to apply that sum in discharge of their debt of 5000l. and some other debts which they had contracted; and the residue, together with the annual income of the estate, for the purposes of the charity, under the rules and orders contained in this act.

It also constituted the trustees, of whom Sir Eardley Wilmot * was one, a corporation, by the style of "The Trustees of the Rugby Charity School, founded by *Lawrence Sheriff*:" authorised them to purchase lands in mortmain, not exceeding 100l. a year; to use a common seal, and to lay before the court of Chancery plans for the application of the surplus rents, whenever there should be occasion.

It also directed, that when the trustees should be reduced to eleven, the survivors should choose new trustees. That they should within three months next after any vacancy, appoint a head master, and one or more under masters or ushers, with salaries; all of whom should be removeable at the discretion of the trustees, at their meeting in August. That the masters should be protestants of the church of England, as by law established: that the head master should have taken the degree of M. A. at Oxford or Cambridge. That the masters should instruct the boys of Rugby and Brownsover, and of any of the villages within five miles of Rugby, gratis, in the

* He had twice declined to accept the seals, and resigned his office of chief-justice of the Common Pleas in 1771. He was the author of this statute.

principles

principles of the Christian religion, morality, and good manners: with a provision for superannuated masters. And it gave to the head master a certain allowance out of the fund for every foundation scholar. It directed that the trustees should meet quarterly, on the first Tuesdays in February, May, August, and November, and hear the boys examined: and it established exhibitions, by enabling the trustees, from time to time, to send eight boys to any of the colleges or halls of either university, with a stipend of 40l. each for seven years, in case they should actually reside eight months in the year in their college. Cy Pres.

Under the regulations of this act, which were suited to the revenues of the charity at the time it was passed, the school was conducted and enlarged with considerable success and reputation until 1808, when it became necessary, and the funds enabled the trustees, to make great improvements under the sanction of the court.

The Middlesex estate, which in the founder's time was "a close of pasture" of small value, had been since covered with eighty houses, two mewses, a chapel, and other buildings, forming the northern end of Lamb's-conduit-street, part of Great Ormond-street, and several adjoining streets and places. And about the year 1804, the rental of this estate alone having encreased to upwards of 2000l. a year, and an accumulation having been made from surplus rents to the amount of 40,000l. 3 *per cent.* consols, the trustees, under the provisions of this act, applied to the lord-chancellor for an extension of the charity; and upon stating these facts, an order was made on the 14th April, 1808, authorizing them to allow the head master an additional sum for every foundation scholar, to raise a sum not exceeding 14,000l. and apply it in rebuilding the school, erecting a dining-hall, dormitories,

Cy Pres.

tories, and studies; and to increase the number of exhibitioners from eight to twenty-one, and the value of the exhibitions from 40l. to 50l. *per annum*. This order was carried into immediate effect.

A part of the founder's beneficence was to erect and endow alms-houses in Rugby, which has been done upon the scite of the old school.

I desire to acknowledge this report from Mr. Pugh, jun. lately one of the scholars on this foundation, as it partly appeared in Gent. Mag. March, 1809.

7 Ves. jun. 323. 1802. Bp. of Hereford v. Adams.

George Jarvis, by will 1790, bequeathed his personal estate, in trust, for such number of poor inhabitants of a parish, in such proportions, either in money, provisions, physic, and clothes, as the trustees should think fit, for the better support and maintenance of such poor inhabitants: and the dividends of other part of his personal property for other poor inhabitants of another parish; and the dividends of the remaining part, for the poor inhabitants for another parish; and the residue to the same charities; but that none should be applied in erecting any public or other building whatsoever. By a codicil he explained, that the dividends only of the property should be so applied.

The trustees filed their bill for an account and directions, and Lady Twysden, the daughter, as next of kin, applied to have the legacies declared void. By the decree, however, they were permitted to present a scheme.

The report stated the income and the number of poor persons in each parish. The trustees proposed a scheme for paying stipulated sums for the charitable purposes; and the next of kin proposed a sum to be apportioned among the poor of the three parishes, and the rest to herself. Lady T. excepted to the report.

The lord-chancellor deemed her plan liable to many of the

the objections capable of being made to the other; and Cy Pres.
as to giving the surplus to her, in that state of the record it was impossible; for such purpose could not be said to be part of a plan for distributing in charity according to the will. Her claim must be on the ground that the object aimed at is impracticable in fact, or which is the same thing, in law; and that the property being undisposed of, she is entitled as next of kin. As to the plan of the trustees, I have nothing to do with arguments of policy. If the legislature thinks proper to give the power of leaving property to charitable purposes, recognised by the law as such, however prejudicial, the court must administer it. If it is right to put bequests of personal property to charity under the same fetters as real estate, that is for the legislature; and courts of justice must act without regard to the impolicy of the law. It cannot be supposed this testator was unacquainted with the state of these parishes; the will being made only three years before his death. If he had been asked as to the particular mode of executing his plan, he would probably have been under as much difficulty as the court is. In two codicils he confirms the disposition made by the will. If this can practically be carried into effect in point of law, there is so little objection, that the court is bound to give it effect. The testator certainly thought so. If that is founded in error, Lady Twysden, the daughter, would have more to do to get at the surplus, than to say, it could not be practically applied. She must contend that the application to charity must be precisely as it is given by this will—a point certainly not settled; and that could not be settled upon these exceptions. If her claim was grounded not upon the impracticability, but upon the impolicy of the object, there will be much more difficulty before she gets rid of the *cy pres* doctrine: upon

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Cy Pres. Amb. 228.

many of the cases, particularly *De Costa* v. *De Pas*, imputing to the testator a general intention of embalming his memory, as Lord-chief-justice Wilmot says. Upon either head, therefore, it is open to serious argument, whether she can take it.

Respecting the report, his lordship said, as to the time and proportions he has altogether confided in his trustees, subject to the exercise of a sound discretion to be exercised by this court; not as to the manner, for that is prescribed by him. I construe it "poor inhabitants not receiving alms." If the word *money* alone had been in the will, it could not be said that you could give the money to the poor inhabitant, enabling him to purchase fuel, provisions, and clothes; and that it is misapplied if the trustees procured those necessaries, and with his consent paid for them. It would be strong to make that distinction. The words *provision*, *physic*, and *clothes*, might therefore have been left out of the will. I look upon them rather as designating to the trustees, how they were to apply the money, than as actually necessary. It is impossible for me to object to the medicines, the testator having expressly said, money laid out in physic would be a good application; and 50l. a year is very little for so many poor families. As to fuel, if the report proposed to advance money for that purpose, that would be directly within the words; and the court will not disapprove it, if the purposes of the plan are secured by the plan. There is no weight, therefore, in that objection to the plan, merely because it does not give the money for that purpose. Then clothes and provisions are expressly within the will. As to the last sums in the report, I agree the money is proposed to be disposed of in a more useful way than any other. The question is, whether in the fair sense of this will, if money is given

to

to a school-master to teach a poor boy reading and writing, that is an abuse of the charity, or an advance of money within the intent and meaning of the will. It is very erroneous to say that which may tend to make it unnecessary to advance to that boy, or his parents, money, provisions, or clothes, in future, was advanced contrary to the will; the advance being made to the intent that he would have that education that would enable him to get his own bread, and maintain his parents. But Lady T. has no interest in that question; for if that would be wrong, it might be divided among the others, and so disappoint her. Cy Pres.

Next as to apprenticing: Suppose the master for a small fee covenants to maintain the boy, would it be contrary to the fair exposition of such a will to advance that money to that person, to relieve the trust from an application from time to time, according to the trust. If the money was given to the boy himself, and he was to pay it as an apprentice-fee, that would be within the will; and the only alteration in the report would be in that respect; and I will not send it back to the master for that. The best plan, perhaps, would be to apply, according to their notions, from time to time; laying their account of it annually before the master: but I cannot lay trustees under those difficulties. Unless Lady T. therefore, can lay before the court a plan under which she can contend for a distribution of the property, as to part of it, upon this principle, that the testator has not given it away, she is not very usefully for herself or the charity contending, whether a payment of money for the benefit of a poor person is, within the strict letter of this will, a payment to that poor person.

Therefore it is best, upon the whole, to confirm the report; declaring that I do it, conceiving the plan therein contained

Cy Pres.

contained agreeable to the true construction of the testator's will. All parties must have their costs, as between attorney and client: and Lady T. also.

Atty. v. Master, &c. of St. Lawrence, Hicks and others. 1805. 1809.

Where there are no objects remaining to take benefit of a charitable corporation, the court will dispose of its revenues according to a scheme to be presented and approved; and probably in favour of a county hospital, which is an extension of the doctrine of *cy pres*.

Queen Elizabeth, by her patent, dated 9th Mar. in the 25th year of her reign, reciting, that she being informed that at a place called *St. Lawrence de Ponteboye*, in the parish of *Bodmin*, in the county of *Cornwall*, there had been of long time a great company of *lazer people*, esteemed by the name of the Prior and Brethren and Sisters, but never by the said queen, or any of her progenitors, so incorporate. And further, that *divers persons*, of their charitable disposition, had given unto the said leprous people divers lands and tenements, by that name of corporation, which they of long time by colour thereof enjoyed; and then thereby maintained the number of 36 leprous people, to the great avail of all her majesty's subjects, inhabiting thereabouts within the said county of Cornwall: her majesty, to the end that the said charitable act might remain inviolate, and might not be defeated thereafter, but such number of leprous people maintained as theretofore had been, of her grace especial certain knowledge, and meer motion, for herself, her heirs, and successors, did give and grant, and did thereby notify and declare, that her will and intent was, that the said lazer people, and all other which from thenceforth should be in the said house called St. Lawrence de Ponteboye, in Bodmin, should be called and known by the name of *The Hospital or Alms-houses of Eliz. Queen of England of St. Lawrence de Ponteboye*, in

in the parish of Bodmin, and should from thenceforth for ever be and consist of a master or governor, and 39 poor men and women, being *leprous people:* and further granted unto the said lazer people, that they should be incorporate, and made a body corporate for ever, by the name of the master or governor, and the brethren and sisters of the said hospital, and remain one body, by that name, incorporate for ever; and by that name should sue and be sued, and otherwise perform and receive all and every other thing that any body-corporate might do, &c. and nominated, &c. one *Lewes Kessell* to be the first master or governor there; and the rest of the poor people that then were in and of the same lazer-house, should be the first brethren and sisters there: and willed that it should from time to time be in the free election of the master or governor, brethren and sisters, lying or remaining, or of the most part of them, to make choice or election, from time to time, as often as any of the said brethren and sisters should die or depart the said hospital, to elect or choose others in their place, to be of their corporation and fellowship, so that the full number of 40, *and no more*, should be there continuing. And likewise, upon the death or departure of every master or governor of the said hospital, that the brethren or sisters, or the most part of them remaining, should, from time to time, make choice of a new master or governor; and that such choice should remain good and stable; and the person so elected should be and continue their master or governor: and also the said master, brethren, and sisters should, twice every day, assemble themselves together, and use such prayers as were then appointed in the church of England, and should, in their prayers, pray for the prosperous estate of her said majesty, her heirs, and successors: and did thereby further give, grant, and confirm Cy Pres.

Cy Pres.

unto the said master, &c. and their successors, all the mansion-house wherein the said lazer people then dwelt, with the lands and mills, and two fairs therein described, to hold the same, to them and their successors for ever, To the only use of the said master governor, and brethren and sisters, and their successors, for ever; to be holden of the said queen, her heirs and successors, as of her duchy of Cornwall, in free socage, and not in capite by fealty only, and such yearly rents as had been theretofore paid for the same for all manner of services and demands. And it was thereby ordered, that the said master, &c. should for ever provide and maintain a good and convenient minister to say the divine service then used within the church of England, within the chapel of the said lazer-house, and to minister the sacrament there, as theretofore in her majesty's time the same had most commonly been used: and it was thereby provided, that if at any time thereafter any controversy or suit should happen between the said master or governor, brethren and sisters, touching any lease or estate theretofore made, or pretended to be made, of any of the premises granted before the said letters-patent to the said master or governor, brethren and sisters, of the said hospital, and any other person or persons; and that information thereof should be given or complaint made to the lord-treasurer of England, and the chancellor of the Exchequer for the time being; if thereupon the said master, &c. should not, from time to time, observe such order and direction as should in that case be made by the said lord-treasurer and chancellor of the Exchequer for the time being, that then and from thenceforth the said letters-patent, concerning only such parts of the premises for which such order and direction should be made, and should not be observed, should be utterly void and of no effect.

An

An information was filed in Hilary term, 1801, stating Cy Pres.
the charter, and that the leprosy for which this hospital was erected had for many years past ceased, and there had not been found a sufficient number of lazer or leprous people to constitute a governor and 39 brethren and sisters of that corporation; and for a considerable length of years a very small number of persons had been able to set up any claim to entitle them to the benefit of this charity; and that the hospital and its estates were now worth about 150l. yearly value, and the greater part had been let by the governor, &c. on lease for years determinable on lives, at a fine and small reserved or nominal rent; and the rest was in the tenure of defendant *Hicks* and others. That the true object and intent of the charitable institution having become extinct, or nearly extinct and defeated, it was insisted that the corporation ought to be deemed as dissolved, and the revenues to be applied to some charitable institution, agreeably to the letters-patent, and the donor's intention, or as near thereto as circumstances would permit, and as the court should direct; and prayed an account of the revenues to be taken, &c. and a scheme to be laid before the court.

For the defendant it was insisted, that it had not wholly failed; that Hicks had been duly elected one of the brethren, and Howell a sister; and they claimed the revenues, although they were the sole objects.

Hicks by his answer stated, that the corporation had continued from the date of the letters-patent, and held the lands in question, but admitted that there had not been for many years past, nor was there then a sufficient or nearly sufficient number of lazers or leprous people to be found to constitute a governor and 39 brethren and sisters; and that for 20 years past and upwards, there had not been more than 10 or 12 persons who had set up any

Cy Pres.

claim to the benefit of the institution, as part of such corporation, and that there were then only four or five claimants; that the supposed improved rents of the hospital and lands might amount to about 100l. *per annum*. That some of the charity-lands had been let by the governors on leases for 99 years, determinable on lives for fines certain; and other parts for terms for fines certain, and at reserved rents; and other parts were let at reserved rents, without fine.

That he then held one lease at a rent of 21l. but did not claim any other benefit in the revenues of the hospital or lands; and denied that he had ever pretended the corporation was now filled up, but believed the contrary to be true; and denied that he had been elected master, or qualified so to be, or entitled to receive the rents, except as to his lease. That one *Richard Goss*, the last governor, who lately died, having been apprehensive that after his death the management of the hospital would fall into improper hands, had requested Hicks to take that office upon him, for the benefit of the surviving members, which Hicks then promised; but after Goss's death, finding some of the surviving members to be very troublesome, he declined acting as such governor, and now disclaimed any right to that office, or to being a member of the corporation, or to have any right or interest in any of the charity-lands or revenues, except his lease.

Edward Howell, and *Elizabeth* his wife, other defendants, by answer stated, that in 1795, *Richard Goss*, pretending to be master or governor, and four other persons, pretending to be brethren and sisters, and seized of the lands, and to have power to sell one share of the profits thereof, she, with her then husband's consent, in her then name of *Evans*, contracted with them for such share at 15l. and that by bargain and sale, which she

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set forth, the same was conveyed to her as Elizabeth Evans for 99 years, if she should so long live. That said Evans died, and she afterwards married defendant *Howell*, and they enjoyed the lands so granted to her; and this without any notice that the corporation was liable to be deemed in this court as dissolved. Cy Pres.

It was urged at the hearing, on the part of the relators, that this hospital had become very obnoxious, not only to the neighbourhood, but also to the county in general, having been converted into a receptacle for all sorts of idle and disorderly people; and the gentlemen of the county were desirous of having it dissolved, and its revenues applied to the county hospital. A D. 1803.

It was contended that the founder might have been the original grantor of the property, which was only held of the duchy of Cornwall, and that such was at that time no new tenure: therefore the court might take it that the queen was possessed of lands held of the duchy of Cornwall. That this was like the failure of a trustee; where there is no one in whom the legal estate is vested, it vests in the donor, but clothed with a trust, and therefore the application was to the court for directions. The master had not only found the corporation to be dissolved and all the objects failed, but that none existed. Co. Lit. 13.

Then, although from circumstances a legal purpose could not be executed, the court could execute it CY PRES, either by *sign manual*, or by scheme, as in *Moggridge* v. *Thackwell*.

That this court could not make the corporation void; that at law it was gone, and had reverted to the donor—but in equity it subsisted.

The cases of the Jewish synagogue and Foundling hospital are, that if there be a legal purpose, which from

Cy Pres. 7 Vezey, 86.

circumstances could be executed, the court will carry it into execution *cy pres*.

MOGGRIDGE v. THACKWELL established this principle, that when there is a general indefinite purpose, not fixing itself upon any object of disposition, the charity is in the king by sign manual: but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust.

It was insisted that it was void: that the case of a trustee escheats: the court looks at all the facts of the case, and upon those facts declares upon the equity; then whether the sign manual or a scheme. Suppose the trust to escheat, there is no equity against the crown. That it might be contended that if lands are given to a corporate body, and it is dissolved, they will revert to the donor, and not escheat. Corporations for a charity are but trustees. In a bill on behalf of a charity, it is not necessary to make the terre-tenants parties. If a common person or persons, with possessions of small value, found an abbey, and the king afterwards endow it with great possessions, yet the common person is the founder. He that gives the first possession to any corporation is the founder. If lands be given to an abbot, and his successors, if the abbot and all the convent die, so that the body-politic is dissolved, the donor shall have his land again, and not the lord by escheat. The law annexes such condition in law to every such gift or grant.

Atty. v. Ld. Gower, 1740. 9 Mod. 226.

6 Viner, 277.

Co. Lit. 13 b.

11 June, 1805. Rolls.

By the decree Sir *W. Grant*, master of the rolls, directed an inquiry, whether there were any persons then living who were members of the corporation, &c.; whether there were any other persons who were entitled, or claimed to become members thereof; the master to take an account of

of the estates, and inquire whether they were held by any, and what leases, or in whose occupation, and at what rents, and to state any special circumstances, &c. Cy Pres.

The master, by his report, stated the charter, but that there was not then, nor for a long time past had been, a sufficient or nearly sufficient number of lazers or leprous people to be found to constitute a governor and 89 brethren and sisters, and that a very small number had set up a claim to the benefit of the hospital. That advertisements had been published for all persons claiming to come in, and several persons had proved their claims to small annuities granted out of the profits of the lands, under the common seal of the corporation, and leases also for 99 years on lives; and by which it appeared, that in 1790, there were only three brethren and four sisters, besides the master; in 1795 there were only one brother and three sisters, besides the master; in 1800 only one brother and one sister, besides the master; and that it did not appear that any others, except these three persons, claimed, or appeared to be proper objects of the charity, or had been admitted to, or considered as brothers or sisters of the said hospital; but that the other claimants claimed annuities, &c. for valuable considerations paid by them to the persons claiming to be master, brethren and sisters, under some agreement made between them; and under those circumstances it did not appear that there were any persons then living who were members of the said corporation, or entitled so to be. 28 June, 1803.

That Hicks held a repairing lease, dated 5th Dec. 1799, of part of the charity lands, under the common seal, for 21 years, in consideration of 45l. at the rent of 21l. And the master found that part of the hospital revenues consisted of two fairs, the tolls of which yielded 20l. which Hicks had received: and that he had been in the

Cy Pres. immediate occupation of some parts of the charity lands, and in the receipt of the rents and profits of other parts thereof, and occupied by him.

This cause was entered at the rolls for further directions upon this report, and upon the hearing it was contended, on the part of the relators, that by the words of the charter the effect was to make the lazer people a body corporate, and to confirm to them those lands; and as to the validity of the leases and deeds, mentioned in the master's report, according to the case of the *King* v. *Bellringer*, there not having been a majority of the members of the corporation required by the charter when any of those deeds were executed, the corporation was in fact dissolved, and therefore they were not only incapable of electing new members, but of doing any corporate act; so that all those deeds became void. The corporation was to consist of a governor and 39 poor men and women being leprous.

4 T. Rep. 810.

The case above-mentioned arose upon an information in nature of a *quo warranto*, calling on defendant to shew by what right he claimed to be a capital burgess, of the number of 24, in one borough of *Bodmin*. It was determined, that where a charter of incorporation required that the mayor, &c. and the common council for the time being, or the major part of them, should elect, and the common council was declared to be a definite body consisting of 36; a majority of the whole number must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election can be had at all. *Rex* v. *Bellringer*, 4 T. Rep. 810 —See 5 Burr. 2598. Cowp. 248. 537. 3 T. Rep. 199. 279. Cald. 315.

And therefore it was urged, that the different deeds and leases should be declared void, and that it should be referred

referred to the master to approve of a scheme for the future appropriation of the revenues of the fairs and estates of the corporation, and an account to be taken of the rents and profits received by Hicks, and all costs to be paid by him out of the rents in his hands, if sufficient, and to pay any surplus into court. But his Honour took an objection, that the court had not power to interfere, but that the charter being by grant from the crown, when the object of the charity ceased, it reverted to the crown; and he thought the proper mode of proceeding would be an application to the chancellor as visitor for the crown, and referred to *Attorney* v. *Smart*. Cy Pres. 1 Vez. 72. Ante. 143.

The cause stood over; and upon a consultation with the then Attorney-general, it was thought adviseable to set it down before the chancellor. When it came on before Lord Erskine, his lordship thought it necessary that the Prince of Wales should be made a party to the suit, it being doubted, whether, on the dissolution of the corporation, the lands did not revert to him as Duke of Cornwall, and not to the Crown; and also to make all the persons who had claimed before the master parties, and it was ordered that the cause should stand over, with liberty for the relators to amend their information, or to file a supplemental information, as they should be advised. 20 Mar. 1806.

And his lordship said, he thought the information was properly filed, that there was nothing here with regard to the king in his visitatorial capacity. The question was, to whom the lands reverted, whether to the crown or elsewhere. If elsewhere, it would be most unjust not to have the other parties, though it might be as clear as the sun, they could have nothing to shew against the proceeding.

A supplemental information was accordingly filed against the Prince of Wales, and the different claimants mentioned in the report. Nov. 1806.

The

Cy Pres.

The Prince of Wales, by his answer, alleged, that by the statute of 11 Edw. III. the eldest son of the king of England, who should be inheritable to the kingdom of England, should be Duke of Cornwall, and that the duchy of Cornwall should always be from thenceforth to the eldest son of the king of England, who should be the next heir of the aforesaid kingdom, and that the aforesaid eldest son of the king of England should hold and enjoy towards their maintenance, and for the support of their princely state and dignity, all the whole duchy of Cornwall, and all castles, honours, lordships, manors, lands, tenements, and all other hereditaments to the said duchy belonging or appertaining, or reputed or taken to be part, parcel, or member of the said duchy, and that the said late King Edward III. in the aforesaid parliament, held in the said 11th year of his reign by his certain charter made with the common assent and council of the prelates, earls, barons, and others of the king's council in the said parliament called together, and by the authority of the same parliament had given to Edward, then *Earl of Chester*, his first begotten son, the name and honor of Duke of Cornwall, and him in the dukedom of Cornwall established, and by the same his charter, with the common assent and council aforesaid, gave and granted to his said son, in the name and title of the duchy aforesaid, and under the name and honour of duke of the said place, divers castles, boroughs, towns, manors, honors, lands, tenements, and other hereditaments. To have and to hold to the same duke, and to the first begotten son of him and his heirs, kings of England, and of the same place, dukes in the kingdom of England thereunto succeed, together with the knights' fees, advowsons of churches, abbeys, priories, hospitals, chapels, and with hundreds, fishing, forests, chases, parks, woods, warrens, fairs, markets, liberties, free

free customs, wards, reliefs, escheats, and services of tenants, as well free as villains, and all other things to the aforesaid castles, boroughs, towns, manors, honors, lands, tenements, and other hereditaments howsoever belonging or appertaining of the aforesaid King Edward III. and his heirs for ever; and the said late King Edw. III. by his charter aforesaid, in parliament aforesaid, with the common consent aforesaid, and by authority of that parliament, the aforesaid premises with their appurtenances to the said duchy annexed, and united to remain to the said duchy for ever, so as from the said duchy at any time by no means that they should be separated, nor to any other or others than to the dukes of the same place by the aforesaid late king or his heirs should be given, or any ways granted, so also that the aforesaid duke and other dukes of the same place deceasing, and the son or sons to whom the aforesaid duchy, by color of the grants aforesaid, should belong not appearing, the said duchy, with the aforesaid castles and other the premises, should revert to the said late king or his heirs kings of England, and of his heirs kings of England to be holden until any of such son or sons of the said kingdom of England hereditably to succeed should appear as is aforesaid, to whom successively the said duchy, with the appurtenances, the aforesaid late king, for him and his heirs, granted and willed to be delivered, to be holden of the said king and his heirs for ever, as is before expressed: that he was by virtue of such statute Duke of Cornwall, and had been informed and believed, that no heirs of the original donors of the said lands, belonging to such body corporate, could be discovered, and he believed there were none such, and that the said corporation had been dissolved by the means stated in the master's report, &c. and therefore insisted, that the lands belonging to the said

Cy Pres.

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said corporation had escheated to him as Duke of Cornwall, the same by the said letters-patent of her majesty Queen Elizabeth, being granted to be held as of the said duchy; but in case under and by virtue of such reservation he was not entitled to the same, he insisted proper directions ought to be given to enquire what lands belonged to the said body corporate, and of whom and by what tenures the same were originally held, and whether the same were not held of the said duchy of Cornwall, or of any manors or honors thereto annexed; and in case they were so held at the time of making the said act of parliament in the reign of his majesty King Edward III. then he submitted that the same could not be separated therefrom, and that he was entitled to the same by escheat, and he hoped that all his right would be duly preserved, &c.

The other parties, by their answers, insisted that valuable considerations had been given for their securities, and claimed the benefit of them.

Upon the hearing of the original and supplemental information, the counsel for the Prince of Wales suggested
30 July, 1808. the propriety of a conference with his Majesty's Attorney-general, whether he would contest the right of the prince, and therefore the cause was ordered to stand over.

It did not appear by the charter, that Queen Elizabeth ever intended that the number of the members of this corporation should increase, or that she would augment the estates by which the charity was endowed, and they were, probably, the same which had been originally held by the prior and brethren of the ancient foundation; but that they should be held "as of her duchy of Cornwall." These words could scarcely create any descriptive meaning, such as that they should be held in the same manner as any other lands in that duchy, because the duchy

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in its various parts embraced many different kinds of Cy Pres tenure, and this grant limits that these lands should be held in free socage, &c.; therefore it is fair to conclude, that her meaning was, that they should be held as part of her duchy by those of her heirs and successors, who should hold the duchy. Now in this she does not appear to have annexed any new right to the duchy, as it is expressed that the lands were to be held by "such rents as had been thentofore paid; from which words, in connexion with the general tenor of the charter, which, as to property, may be considered merely as a confirming grant, there is reason to suppose that the lands had been previously held of the duchy subject to those rents: what those rents were cannot now be ascertained, for although a very large portion of the landed property throughout the county of Cornwall, exclusive of the various manors, wholly belonging to the duchy, was anciently held by military service, to be rendered to the castles and honors of Launceston and Trematon, or by rents, in lieu of such service collected by the feodary and escheator of the duchy, to an annual amount that shews the number of rents to have been considerable, yet only two of these rents now continue to be paid, the rest having long since been lost, owing, in a great measure, to the office of feodary and escheator having ceased upon the abolition of military tenures by 12 Car. II. c. 24. It would have been therefore correct for the counsel of his Royal Highness, to contend that these lands had escheated to him; and if any doubt remained as to the establishment of his right, the duchy charter of the 17 of March, 11 Edw. III. A. D. 1337, might have been referred to, wherein escheats are particularly mentioned, among various rights and privileges conveyed to the Duke of Cornwall; an exemplification of this charter, taken 5th of March,

Cy Pres.

March, 3 Ja. I. from the records in the Tower, is deposited in the duchy office, and is to be found printed in the parliament rolls, 38 Hen. VI. and its force and effects are stated in 8 Co. Rep. 1.

Upon reference to the inrollment of Queen Elizabeth's grant, at the Rolls chapel, it appears to have passed under the great seal, and hence a doubt might arise, whether these lands were originally part of the duchy. The grants of duchy land by the crown, when there is no duke of Cornwall, pass under the Exchequer seal; but it is apprehended that the nature of this grant, as conveying or confirming a perpetuity, required the great seal. And in this mode the queen made various grants in fee, duchy manors and estates, to different persons, from whom they were afterwards recovered by Prince Henry,

8 Rep.

son of King Ja. I.

This duchy charter conveys to the dukes of Cornwall the advowsons of churches, abbies, priories, hospitals, &c. belonging to the duchy, castle, &c. amongst which this hospital of De Ponteboye might have been included, as it was evidently in existence before the time of Queen Eliz.'s grant. But even if it could not be proved that the lands had originally passed from the duchy to the hospital, yet the dukes of Cornwall would be entitled, under another charter of Edw. III. to all escheats throughout the county of Cornwall. This charter bears date 8d Jan. 11 Edw. III. A. D. 1338, whereby the king, after reciting that of 17th March preceding, and expressing that the present grant was for the better provision of his son, Edward the Black Prince, conveyed to him, and to the dukes of Cornwall, for ever, all fees or feuds belonging to the crown in Cornwall, together with wards, marriages, reliefs, escheats, &c. which might belong to the king or his heirs, by reason of such fees. An exemplification

plification of this charter is deposited in the duchy office, and is printed in the parliament rolls, 38 Hen. VI. vol. v. fo. 360, whereby the right to escheats granted by the first charter, as to lands held of the duchy in particular, was, by this 2d charter, extended to whatever was held of the crown throughout the county of Cornwall. Cy Pres.

Upon the further hearing of this cause before Lord Eldon, chancellor, the question was, to whom these lands revert, as the right heirs of the original donor could not be found: and whether they would revert clothed with a trust for charity, so as to entitle the court to interfere. 4 Mar. 1809.

Agar, for the defendant *Hicks*, contended, that according to the rules of this court, if there are trustees of a charity, the court may direct the charity: but this is a gift to a corporation, and if that corporation be dissolved, the charity lands must revert to the donor, or his heirs-at-law. But in this case *Hicks* holds a lease from the corporation. The master, by his report, states, that there are not now a sufficient number of members to make a corporation, for the charter limited the charity to not more than 40; but the charter did not say, that if ever there should not be more than 40 members, the corporation should be dissolved: nor is there any evidence to shew that it was not a corporation sufficient to grant this lease. The question will be, whether as the number is reduced below that limit, and that there being no members, the charity-lands so granted should now revert to the heirs-at-law of the donors, as the only persons now entitled.

It is proposed to refer to the master to receive a scheme for another charity, and to take an account of the rents and profits: but who can eject *Hicks* from his possession; no ejectment can be brought by a receiver without leave

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Cy Pres.

of the court. The heirs of the donor have not been made parties to the information, which should have been done, if they now set up any claim to the lands in question. The court will not admit them, but observe the direct charity; and an advertisement should be directed to call for them.

There is no reason to order an account of the rents and profits, for there is no evidence of any such in being —he is merely a lessee.

Young insisted, that if the heirs-at-law of the donor do not come in, the crown takes, or the Duke of Cornwall. That defendant *Howell* had advanced a small sum of money upon security of his lease, and claimed to be paid in the first instance. It was an interest due to the public that something should be done for the charity, rather than it should be suffered entirely to fall away.

Richards contended, there had been a decree already on this information, and on that ground with others, it must be sustained. This was originally a gift of the crown to a corporation for charitable uses; or more probably the gift of several persons, who were afterwards incorporated by the crown; for it is recited, that "divers persons had given divers lands," &c. Perhaps it might have been a gift by the Duke of Cornwall; the corporation, therefore, took the lands given as trustees for the charity, which, whether it fail or not as to the legal estate, the lands once given to charity, must ever remain to charity; and herein a distinction has been always observed between estates in general, and those appropriated for charity: in general, for defect of heirs, estates escheat to the crown—but a charity subsists; and the crown or the lord of the manor takes the land subject to charity. Now it is to be considered whether the crown shall dispose of it: to whomsoever the land may revert, the

the charity, or a similar one, must subsist. Now as this charity fails, the information prays that a similar one may be substituted. Cy Pres.

Hicks has a lease which no one ought to have taken, and he is one of the corporation: he cannot be lessee and trustee. In the *Grantham* case, one object of the information was to set aside leases which were void, and an abuse of the charity trust, and the lessee to account for the rents and profits from a certain period. It is admitted there is no legal estate: but this has nothing to do with the legal estate, that not being necessary to establish the charity. In a recent case of *Bradford*, no persons could exchange the legal estate, until it was authorised by an act of parliament. Persons are now feeding upon the charity lands, who are not the objects of it.

Lord *Eldon*. The question here is, whether the charity lands, upon the dissolution of this charitable corporation, revert to the heirs-at-law, if they could be found, or to the crown, or to the Duke of Cornwall. The rule is, that if lands given to a corporation for charitable uses, which in the donor's contemplation were to exist for ever, and it becomes impracticable to execute the charity, as in Dr. *Ratcliffe's* case, the heir-at-law can never have the lands back again, but another charity similar to it must be substituted, so long as the corporation exist. If the corporation are themselves trustees for a charity which cannot be executed, then the heir-at-law cannot have the lands, but the charity will be directed by the crown, or by the king in his court of Chancery. If it was originally a gift to charity, the king by his sign manual will execute it in Chancery. As in the cases of sums given for augmentation of livings, the court substituted another charity. If the charity does not fail, but

Cy Pres.

the trustees fail, I cannot be led to think that if a corporation be vested with a trust to maintain a charity, and that corporation should die, that this court would not carry on the charity. If the legal estate reverted to the crown, the heir of the grantor would be a trustee. If the corporation should be dissolved, the charity failing, they are trustees *cy pres*; if not dissolved, still they are trustees for the charity.

Hicks must be dealt with according to the fact. If he was a governor, this court has a jurisdiction over him; if he was not a governor, and the corporation existed when the lease was granted to him, then he must hold it; but the lease must be shewn, and then it will appear whether he had notice of the charity: if it was taken under due notice, it must be delivered up.

On the 6th March, 1809, the counsel for the crown and for the Prince of Wales, consented to wave their claims, in expectation that the court would refer it to the master to approve of a scheme which was intended to be in favour of the county hospital. Lord Eldon directed the master to inquire what Hicks had laid out in substantial repairs and improvements, and that he be allowed them; and that the deeds and leases mentioned in the report be delivered up as void; and that an account be taken of the rents and profits in his hands. The master to receive and approve a scheme for the future application of the rents and profits of the two fairs and estates: and the costs were reserved till after the further report. Lord Eldon suggested that it would be proper to acquaint the other lessees, that if they quietly surrendered their leases, they might be dealt with as leniently as Hicks, otherwise their leases would be set aside, upon being brought into this suit.

SECTION XI.

Of Marshalling Assets.

THE court has always shewn a disinclination to carry their favour to charities, so far as to marshall a testator's assets, where the residue being bequeathed for charitable and other purposes, consists of mixed property of real and personal estate, so as to direct the debts and other legacies to be paid out of the produce of the real, and to reserve the personal to fulfil the benefactions: for as charities cannot partake of the real estate, or of any personal which savours of the real estate; so when both are converted into money, it is impossible, unless entirely separate accounts are kept of the respective produce of each, which would often lead to a very inconvenient multiplication of accounts, not in general practicable, to trace what belongs to the one and to the other.

In addition to what was said before in the case of *Vaughan* v. *Farrer*, the following determinations may serve to elucidate the rules on this subject.

Jane Churchill directed her real estates to be sold, her debts and legacies to be paid out of her personal estate, and residue to her trustees, to be distributed in charities as they should think proper, particularly recommending to them the hospital at Bath. The trustees agreed that all money arising from a real estate, is to be accounted as real; the bequest was so far void, by 9 Geo. II.; but desired, that in compliance with the intent of the testatrix, the assets should be so marshalled, that all the other legacies should be paid out of the real estates, and so the personal go to

Mogg v. Hodges, 1750. 2 Ves. 52.

the charity. Lord-chancellor said, This is contrary to the express direction of the testatrix, who desires first that her lagacies and debts should be paid out of the per-
1745. sonal. In *Dalton* v. *James*, the debts and legacies were charged on both estates; but the assets cannot be so marshalled to support a legacy contrary to law. Decreed that the trust must either take effect according to the whole intent, or not at all; and as all money, arising from the sale of real estate, was still to be accounted as real; so all lands to be bought with personal, were still to be considered as personal—*Ex relatione.*

1752. Amb. 158. In *Attorney* v. *Graves*, Lord Hardwicke said, I shall not set up a new rule for the benefit of charities, but they may have benefit of the old rule.—When there are general legacies, and the testator has charged his real estate with payment of all his legacies, if the personal estate is not sufficient to pay the whole, the court has said the legacy to the charity shall be paid out of the personal estate, and the rest out of the real estate, that the will of the testator may be performed *in toto.*

1 Vezey, 108. Arnold v. Chapman. In *Arnold* v. *Chapman*, Mr. Emerson devised a copyhold estate to Chapman, he causing to be paid to his executors 1000l. and after payment of debts and legacies, the residue of all his estate freehold, copyhold, leasehold, plate, rings, stock, &c. he gave to the *Foundling hospital.*—The charity insisted that the assets should be marshalled, and the debts and legacies charged on the real estate, that the personal estate might go clear to the charity. The devisee of the copyhold insisted, that the 1000l. should not be raised at all; for that it was the same as if the condition was to pay to the charity, which was an unlawful act, that could not take effect, and therefore void, and the estate absolute. The next of kin insisted, that as by the statute of *mortmain*, it was void as to the charity, and as the

the devisee could not take without performing the condition, it should go as part of his estate undisposed of, according to the statute of distribution.

Lord Hardwicke, chancellor, said, The Foundling hospital is certainly a good and laudable charity, and should receive all possible encouragement; but the rules of law cannot be broken into, and laid down different for that, from all other hospitals in the kingdom. Had he devised the copyhold estate, on condition to pay 1000l. to the governors, it would have been void by the statute; he has taken another method, by including it in a residuary bequest of real and personal estate; and it is said, that they can take, because by giving it to executors, he has made it part of his personal estate; and he may undoubtedly, if he pleases, turn it into personal estate; but it must be for lawful purposes. But here the act intervenes; which, if this was allowed, would be easily evaded; for it would be only directing the real estate to be sold, and the money to the charity. In the case of James this was determined to amount to a devise of the land itself; because all charges, trusts, sums of money, &c. devised out of land to a charity, are made void by the act. It is said the assets should be marshalled; and this case put, that since this act, a man may say he charges his real estate with debts and legacies, and gives his personal estate to a charity: possibly that may do; but it would go a great way towards overturning this act: but as to that I will give no opinion; for there an intention appears in the testator; here, no exoneration is intended by the will. As to the rule of the court of *marshalling assets*, I must take it to be the same as it was before the statute: and if 1000l. was devised, and debts charged on real and personal estate, the rule before the statute was, *that the debts should be paid out of the real*

estate, and the legatees should come on the personal. The court will do the same now; not by way of standing in the place of creditors, but by turning the debts on the real estate. But that is no rule, for that where real and personal is charged, and the residue given to a legatee or children, the court would in such case turn the charge on the real, to give the whole personal estate to the legatee. In case of *papists*, the court would not do for them, what it would not do for any one else; and this is a stronger case than that. In *Roper* v. *Ratcliffe*, it was resolved, that whatever is taken out of the real estate, shall be considered as real; and this would be taking out so much of the real, for the charity; which therefore shall not go to it. The legacy was decreed to the heir-at-law, and not to the devisee, because it was well made on the real estate, but not well disposed of, by reason of the act.

The same principle seems to have always guided the court, That though it will not marshal assets, and throw the debts upon the real estate generally, yet, where the court can support a charity, it always will.—This was nearly the same doctrine as that held in *Atty.* v. *Tomkins*, in 1754, where the residue consisted, *inter alia*, of lease-hold estate, which was ordered to be first applied to debts and legacies.

Atty.-gen. v. Tomkins, 1754. Amb. 216.

Benjamin Tomkins being possessed of a term of years in land and other personal estate (but not seized of any realty), by will, 19th June, 1751, after directing payment of his debts and legacies, devised the residue of his real and personal estate to trustees, to be managed in the best manner they could; the income to be applied towards clothing four poor men and four poor women, for ever, that should be inhabitants of the hospital left by his late grandfather, in *Abingdon*, Berks.; and when there

there should be no such hospital, he directed the same to be disposed of amongst such poor people of the baptist nomination as his executors should think proper.

After argument at bar, Lord Hardwicke, chancellor, said, it has been determined on the statute against papists, and likewise on the statute of mortmain, that the words "*any estate or interest*" in lands extend to leaseholds.

Question. Whether as the leasehold in the present case passes under the residuary clause, and not as a specific devise *eo nomine*, that will make any difference? I shall not found my opinion on any such distinction. The observation I made in the *Attorney-general* v. *Graves*, (21st Nov. 1752) was in case of a liquidation of real and personal: and nobody could say out of which the debts and precedent legacies were paid. It might deserve consideration, but I gave no opinion; and I give none upon it now. My judgment is founded on the last point, that is,

Whether this leasehold shall not be applied first in payment of debts and legacies, and the charitable bequest take place out of the rest of the assets?

The reason of marshalling assets of the personal as well as real, is always *ut res magis valeat quam pereat.*

As where there are general legacies charged on real estate, if the personal estate is not sufficient to pay the whole, the legacy to the charity shall be paid out of the personal estate, and the rest out of the real.

So where there is a particular disposition of the different species of estate, enumerating them, and in the devise of the residue one of them is left out, that part shall be applied first.

So when there is a charge on the real estate, and part

of it is left undisposed of, and descends, that part shall be the first applied. *Galton* v. *Hancock.*

The same rule might prevail in this cause: for though this court will not set up a new rule of marshalling assets, in order to defeat and avoid the statute of mortmain, yet the old rules may and ought to be applied, as before those statutes.

The bequest is good as to all the personal estate, except the leasehold: the leasehold cannot go to the executors; because, 1st, the testator has used words to shew his intention of giving it away; 2dly, they are excluded from the undisposed residue, by having legacies: therefore it goes to the next of kin, and shall, according to the above rules, be first applied to payment of the debts and legacies, as a real estate descending would be before that part that is devised; and there being more debts and legacies than the leasehold estate would extend to pay, his lordship ordered it to be sold, and the deficiency made up out of the other assets, and the rest to be applied to the charity.

2. This is not a specific bequest, as every devise of a realty is but a general bequest of the *residuum.*

1766. Atty. v. Caldwell. Amb. 635.

Where the bequest was general, "That the remainder of all the testator's effects, annuities, mortgages, bonds or notes, with furniture, &c. be sold, and what money they should sell for he gave to two charity-schools for boys and girls of St. Andrew, Holborn, in equal moieties"—the mortgages were for years;

Two questions arose: 1. Whether the bequest, so far as relates to the mortgages, is void by the statute of mortmain?

2. Whether the court will not marshal the assets, and apply the mortgages in the first place to pay the debts, in order to leave the larger fund for the charity?

The

The master of the Rolls was clear, upon the first question, that the bequest as to the mortgages was void. The mortgages, upon which the court has given judgment, were mortgages in fee, and this is only a mortgage for years. But that makes no difference; it is an interest in land. The case of *Attorney* v. *Graves* is an authority, that a term in gross is within the description of the statute. And cited *Hall* v. *Grey-coat Hospital*, 1747; *Attorney* v. *Meyrick*, 1750.

Upon the second question, his Honour distinguished between the case where a mortgage is given as a specific bequest, and where it passes by the residuary bequest, enumerated and described amongst the different species of estates, of which the residue consists. In the former case, it cannot be first applied to pay debts; but in the latter, it may: and cited *Attorney* v. *Graves*, and *Attorney* v. *Tyndall*.

His Honour gave directions accordingly, that the mortgages should be first applied.

Mr. Ambler adds the following note to this report.—*N. B.* This is not properly marshalling assets, but arranging the different species of personal estate.

William Browne, the testator, by will, in 1757, had bequeathed his personal estate, and his estate at Foxfield, held by lease of the Bishop of Winchester, descendible to his right heir in trust to sell the same, and to pay his debts and legacies, and also to Winchester College 100l. for superannuates not succeeding to New College; to the county hospital at Winchester 50l.; to the charity for relief of widows and children of clergymen 600l.; and, after reciting that it was uncertain what his effects might amount to, gave whatever remained after debts, legacies, and other charges, to his executors, for such charitable uses as they should think fit.

Hilliard v. Taylor. Amb. 713. 2 Wyat's Dickens, 475.

In

In 1761 the master of the Rolls established the will, &c. and directed that, in case of deficiency of the personal estate, the legatees of the charity legacies should stand in the place of the specialty creditors, and receive a satisfaction *pro tanto* out of the real estate; but without prejudice to the question, whether the legacy to the college was within the saving clause in the statute of mortmain? which might arise in case the before mentioned marshalling of assets should not be sufficient to furnish the whole of the legacies given to charities; and if personal estate and rents were insufficient, the real estate to be sold. The personal estate proving insufficient, the estate was sold. The master having made his report, the cause was set down for further directions, which were given accordingly.

See Mogg v. Hodges. 2 Vez. 52. Atty. v. Forster Sorcsby v. Hollins, 2 Burn's Eccl. 508.

Amb. 704. 1771.

But this doctrine was afterwards denied in *Foster* v. *Blagden*, where the testatrix, *Sarah Knapp*, devised her real and personal estate, after payment of her debts, funeral expences, and charges of proving her will, to the plaintiffs, in trust, to dispose thereof, and directed the trust money to be paid to certain charitable uses.

The bill was filed by the trustees in the nature of an interpleader, against the heir at law and charity legatees, for the directions of the court: and the question was, Whether the court would marshal assets, and order the debts to be paid out of the real estate, in order to leave the personal clear, that the devise to the charity might take effect?

Mr. Baron Smythe (who sat for the lord-chancellor) declared his opinion, that the debts could not be thrown upon the real estate; and that the cases of *Mogg* v. *Bath-hospital*, and *Atty.* v. *Tyndall*, were in point.

1772.

Upon the authority of this determination, the heir at-law preferred an appeal against the decree in *Hilliard* v. *Taylor*,

Taylor, and Lord Apsley, chancellor, without hearing the reply, reversed that decree, so far as related to the charitable legacies to Winchester hospital, and for relief of widows and children of clergymen, on the above authorities of *Dalton* v. *James*, *Atty.* v. *Tomkins*, and *Atty.* v. *Tyndal*, and directed an inquiry what fund was established at Winchester college to defray expence of superannuates at either of the universities: and after ordering the costs, declared that the residue of the 3 per cents. (the produce of sale of the real estate) belonged to the heir-at-law.

His lordship said, if the marshalling assets to let in charity were to be tolerated, the court would be doing that per obliquum which it would not do per directum.—See *Arnold* v. *Chapman*, 1 Vez. 108.

The same principle was afterwards maintained in 1778, in *Field* v. *Mostin*, where the testatrix being indebted to Mrs. Hutchinson in 1411. made her will, and thereby gave to the said Mrs. Hutchinson the sum of 500l.; she also gave a legacy of 400l. to a charity, and the residue of her personal estate to pay her debts and legacies; and if the personal estate should not be sufficient, the deficiency was to be raised by mortgage, or sale of her real estate. Field v. Mostin 2 Wyatt's Dickens, 543.

The personal estate being deficient to pay the whole, it was held, that the court could not set up a new rule, and *Atty.-general* v. *Graves*, 4th Nov. 1752; the *Atty.-general* v. *Tomkins*, 4th March, 1754; *Arnold* v. *Chapman*, the *Atty.-general* v. *James*; Hilary, 1737; were cited as authorities establishing this doctrine. Ambl. 155. Amb. 216. 1 Vez. 108. 1 Atk. 353.

This subject was still further considered in several views in a subsequent case, where the original doctrine was recognised, but where a charity was interested as a legatee, which was enabled to take real estate in mortmain.

Joseph

1792. 15 Dec. Linc. Inn Hall. Lords Commissioners Eyre, Ashhurst, and Wilson—Eyre absent Makeham v. Hooper and others.

Joseph Lloyd, by his will, devised all his manors, lands, &c. as well freehold as leasehold and copyhold, situate, &c. and all his personal estate, to *Hooper and others*, in trust, to sell and dispose of the freehold, copyhold, and leasehold lands, and to sell and convert his personal estate into money; and then, upon trust, out of the produce to pay divers charitable legacies, and 200l. to the treasurer of the infirmary at Bath, also divers pecuniary legacies to friends, and 200l. for erecting a monument in the parish church of Ilton to his memory; and gave the surplus and residue to *W. Makeham* and *D. Evans*, equally between them, whom he appointed executors.

By a codicil, the testator gave divers pecuniary legacies, and another charitable legacy, without mentioning any fund out of which they were to be raised.

D. Evans died in the testator's life-time.

Makeham, the surviving executor and residuary legatee, and *Thomas Lloyd*, the son of *Thomas Lloyd*, the testator's second cousin and heir-at-law (then deceased), and *Thomas Batt*, his first cousin, nephew of the half-blood, and only next of kin, survived him.

This bill was filed by *Makeham* against the trustees, &c. charging that the charity legacies were void by the statute of mortmain, as devised out of the produce of land, and sunk into the residue, to which he claimed to be entitled.

On the part of the charities it was alleged, that, as the personal estate was more than sufficient to pay all the testator's debts and legacies, or at least to pay the charity legacies, the assets ought to be *marshalled*, so as to effect the designs of the will.

On the part of the heir-at-law it was insisted, that, as these legacies were void, he became entitled to so much of the real estates as they amounted to; and was also entitled

entitled to a clear moiety of the residue, which had become lapsed by the decease of *D. Evans* in the testator's life-time. To which *Thomas Batt*, the next of kin, also set up his claim.

Although the testator never made any disposition of the lapsed moiety of the residue of his estate in either of his codicils, yet it appeared that he had often declared his intention, in conversation, that *Makeham*, the plaintiff, should have the whole residue.

The infirmary at Bath claimed that legacy under the statute of Incorporation, 12 Geo. II. enabling it to take lands, &c. in mortmain, not exceeding 1,000l. per annum: and by a subsequent statute, 19 Geo. III. reciting that act, and that the building had been completed, and that a great number of poor, who lived at great distance from Bath, and who, from their indigent circumstances, were incapable of trying or using the waters, had been admitted as patients therein for that purpose, and many of them had been perfectly restored to health, &c.; and stating the income of the hospital in lands not to exceed 240l. per annum towards the 1000l. limited, and about 320l. dividends of stock, exclusive of voluntary contributions; that it was capable of holding 113 patients, but that the income was incapable of supporting so large a number; and that many charitable persons might be inclined to grant lands to the use of the hospital, that were unacquainted with the forms required by the statute of mortmain, whereby their intentions might be frustrated. It was therefore enacted, that all gifts and devises of lands, &c. or of money or stocks to be laid out in lands for said hospital, should be good and valid in law, notwithstanding the statute in mortmain, not exceeding the above limitation of 1000l.——[These defendants stated by their

their answer, that ,the personal estate of the hospital had been increased by pecuniary bequests, but that it had not acquired any greater estate in lands, in consequence of this act.]

Hil. 1784. The lord-chancellor, by decree, referred it to the master to take account, &c. reserving the consideration of the charity legacies until after the report. The estates were ordered to be sold in the mean time, and a distinct account to be kept of the produce of the real and of the personal estate.

15 Dec 1792. This cause coming on again for further directions, on the master's report, it appeared that the charitable legacies amounted to 1200l.; that 1037l. great part of the personal estate, had been applied in payment of debts; and that a balance of 950l. remained in the hands of the plaintiff, as surviving executor.

That the real estates produced a very considerable sum.

The lords commissioners, after investigating all the points of this case, ordered (so far as related to the charities) that the legacy to the Bath infirmary should be paid, as being exempted by the act of 19 Geo. III. from the statute of mortmain; but that they must decide upon the authorities of preceding decisions; that they could not marshal assets for charities; and that, therefore, the amount of the charity legacies belonged to the other claimants.

It appears by this determination, that the charities, except one which was by law exempted from the statute, lost their legacies, although the account of the personal estate was far more than adequate for the payment of them and of the debts, because they were charged upon the residue, which consisted of a mixed property of real and personal estate: it becomes therefore safer for charities,

rities, that their legacies should be given by distinct clauses, and specially charged upon the personal estate; and that if the testator would devote the whole of his residue to charitable uses, he should previously devise all his real, and what personal he possesses that savours of real estate, to other parties; for in cases where there is sufficient net produce of the purely personal estate for the payment of all the debts, charitable and other legacies, the court is not called upon to consider any question as to marshalling assets—nor does it declare a charity legacy to be void, which is charged upon a residuary estate, consisting of personal property only, although it may be insufficient for the payment of them, besides the debts; for in that case the charitable legacies, like all others, will be ordered to abate, in proportion to their amount, there being now no preference allowed to either. The following case, in some respects, exemplifies what has been advanced:

John Redman, by his will, dated 25th July, 1797, bequeathed as follows: "Having provided handsomely for my daughter on her marriage, I hereby bequeath to her children, born or to be born of my daughter Mary Smith (Redman), the wife of Craven Ord, Esq. (the eldest excepted, whose father will provide for him) the sum of 2000l. to each of them at the age of 21, for which purpose I bequeath all my valuable estates at Greenstead and Ongar—the rents to be applied towards their education. And if the estates when sold is not sufficient to fetch that sum, thn the difference to be made up out of the personal estate." He then bequeathed divers pecuniary legacies, among which were several to charitable institutions, and the remainder of his property, be it more or less, to the benefit of the London hospital. 1805. Ord. v. Fatley. MSS.

The testator died in July, 1798, and in Michaelmas term

term following a bill was filed in behalf of the five children of Mrs. Ord, then all minors, against the executors and Mrs. Ord, for an account of the personal estate, and to restrain them from paying the legacies, which were of considerable amount, until it should be ascertained what children of Mrs. Ord would be entitled to 2000l. each, and how much thereof ought to be paid out of the personal estate.

The decree established all the trusts and legacies of the will, except one of 5l. to be paid out of the Greenstead-hall estate, to repair the alms-houses of Captain Cook, which was declared to be void by the statute, with the usual reference of inquiry.

Mrs. Ord was soon after delivered of another child, and she died in March, 1804, leaving six children (besides the eldest) entitled to the 2000l. each. The personal estate consisted of stock in several of the funds to a very large amount; and, with accumulations of interest, much more than sufficient for the payment of all the legacies, besides estimating the real estate at a very fair value, which afforded ample security for payment of such parts of the six legacies of 2000l. each, as could be in any wise probable to fall upon the personal estate, in case of any insufficiency of the produce on sale of the real estate. The legatees joined in an application for payment of one moiety of their legacies. The court finally ordered, upon the confirmation of the master's report, that one-third of the legacies should be paid.

This case differs from the foregoing in the caution above suggested relative to charity legacies; these were all separately given, and not charged upon the residue: the real estate had first been otherwise disposed of, and the residue was given to one of the charities. The disposition of the real estate, in sums of 2000l. among six children,

children, with the charge of any insufficiency upon the personal estate, did not require the court to marshal any part of the testator's assets for the charities; but only a due caution in restraining the payments to them, until the proper period for the sale of the real estate; lest the personal fund should be untimely exhausted, and the charities be served before the testator's children.

SECTION XII.

Of Inrollment.

Unless such gifts, &c.] The whole tenor of this statute applies to gifts to, and not to purchases made by, charitable institutions; and as it limits such gifts of lands to be effectuated by deed, indented at least twelve calendar months previous to the decease of the donor, and inrolled within six calendar months after its execution, it of consequence makes void all devises of land by last will to such purposes; and it directs all gifts of stocks in the public funds, to be laid out in the purchase of lands, shall be transfered six calendar months previous to the donor's death, &c. It does not therefore restrain either the conveyance of lands to a charity, in the first instance; or to future trustees for the same uses, when once vested. Such trustees, although they may be grantors for the purposes of such subsequent conveyances, are not donors; and are only requested to join in such acts, in order to prevent the lands descending to the heirs-at-law of the last survivor, which in all such cases is attended with expense and difficulty. The words of the

statute, "donor or grantor," are here synonimous; and as they apply solely to the benefactor, cannot be construed to restrain any such conveyance from trustees, or to require that in order to render valid their conveyance, they should survive such an act twelve calendar months.

This statute prescribes that this grant should be attested by two or more witnesses; but the statute of frauds, 29 Car. II. prescribes three witnesses; and as that was not repealed, it seems that all declarations of trust of real estate for a charity, must be in writing, and an appointment for such object, if it is not to operate till after the death of the party, and respects real property, must be attested by three witnesses: for such deed of appointment is testamentary, and regards land, and that is enough to bring it within the statute, whatever may be its form.

Roberts on St. Frauds, 359, note.

After the first, from one or more remaining to new trustees, inrollment has not been held to be necessary under the first or third sections, for they point only to such gifts as are limited by the first section, and this appears by the concluding words, "made in any other manner or form, &c." but many have been inrolled for safety.

Although purchases for a valuable consideration are excepted by section 2, yet it has been held that inrollment, though not there excepted, is necessary under section 1, in order to make the grant public: it is therefore implied, but it is not mentioned in the 3d section; and the "making in any other manner," &c. applies to the period of twelve or six months. Hence it should seem that such a deed not inrolled, would not be void by this section; the voidance is the penalty, and penalties are to be strictly construed; if the inrollment can be deemed any part of the making of the deed, it is here provided

provided for, but if not, then the deed is not void without it: and if so, then the heir-at-law of any donor or vendor is still excluded, and trustees may convey a safe title to each other; and this more especially where it was originally a purchase: this seems to apply to a first as well as to a future conveyance. If the first purchase deed was inrolled, the trustees, by future conveyances to the same uses, do but continue their trust, they cannot be said to alienate; but to avoid every construction of that nature, as to their alienation, it is most adviseable to take the new conveyances from the surviving trustees to themselves or one of them, and the new trustees, for the same uses as were expressed in the first deed.

It is remarkable that no cases appear by the books to have occurred, where, after gifts of lands, or of stocks to be laid out in lands for charitable uses, by deed inrolled, the donor has died within the time limited, on which event it is presumed the lands would revert to the heir-at-law.

By the act in 1805, for aiding the augmentation of small benefices, gifts of personal estate to the governors of Queen Anne's bounty, without any deed inrolled or not inrolled, are declared to be as effectual as by deed inrolled previous to this act: but this does not alter or affect the law now in force, respecting gifts or conveyances of land by any deed, or the disposition thereof, or of any personal property by will. 45 G. 3. c. 84. s. 3.

CHAPTER II.

OF EXEMPTIONS FROM THE STATUTE.

Either of the two Universities, or the Colleges of Eton, Winchester, or Westminster.] By the exemption contained in the *fourth section* of the act, in favour of the universities, any land, or personal estate to be laid out in land, may still be disposed of, in trust, for their benefit, or for any of the colleges therein, as it might have been before the date of this statute: but the extension to the colleges of *Eton*, *Winchester*, and *Westminster*, seems confined to any disposition "for the better support "and maintenance of the scholars only upon the foun- "dations;" so that if lands, or personal estate to be laid out in lands, were directed by the will to be applied for any other purpose in those colleges, the devise would be void.

9 Geo. 2. c. 36. Sec. 4. Universities, &c.

Exemptions have likewise been since granted at different times by royal charter, under the authority of 7 and 8 Wm. III. c. 37. and by statute to several institutions of charity, and other corporations; a few of which it may be sufficient to mention.

See ante. ch. 1. sec. 2.

There are also other institutions which have continued to enjoy estates under former statutes or licenses, previous to the date of this act. I have traced them where it appeared to be necessarily within the plan of this work, and where their privileges have been confirmed or extended by subsequent statutes; many of which relate to their

their powers of granting leases, and those will therefore be found in Part III. ch. ii. postea.

The act for establishing and well governing the hospital or infirmary at *Bath*, for the benefit of poor persons who may require to drink the medicinal waters there, incorporates the governors with directions for the reception of patients, who are not to obtain a settlement by their admission. Provides that the money which shall arise by sale of lands, &c. shall be laid out in the purchase of others for the use of the corporation; and prescribes the venue in all actions to be laid in the county of Somerset. 12 Geo. 2. c. 31. 1739. Ante. 365. Bath Infirmary.

The utility of this infirmary having been made sufficiently manifest to induce further encouragement, an act was passed in 1779, empowering the corporation to take and acquire and hold any lands, tenements, or hereditaments, or any interest in lands, &c. pursuant to any will or otherwise, according to the limitations of the foregoing act; and devises were declared valid, although not made conformable to the statute of mortmain. 19 Geo. 3. c. 23.

The words in the act are to be considered as in a charter. The charter of incorporation was only granted by parliament to avoid expence to the promoters of the charity, who were forced to apply to parliament for some other powers, which the crown could not grant: therefore the charter was inserted in the act, and is to be construed as any other charter given by the king only. This particular clause was inserted to avoid the trouble of applying for a license in mortmain, and is to be considered as such a license: the governors are thereby empowered to take lands to such a value, but still with a proviso that they are granted to them in the manner prescribed by that law. 2 Vezey, 53. Mogg v. Hodges

The London hospital, in Whitechapel-road, was incorporated, A. D. 1759, by royal charter, granting to the 32 G. 2. 9 Dec. London Hospital.

governors, and their successors, to be for ever thereafter persons able and capable in law, and to have power, notwithstanding the statutes of mortmain, to purchase, have, take, hold, receive, and enjoy, to them and their successors, manors, messuages, lands, rents, tenements, annuities, and hereditaments, of what nature or kind soever, in fee, and in perpetuity, or for terms of lives or years, not exceeding the yearly value of 4000l. in all issues beyond reprises, so far as they are not restrained by law; and all manner of goods, chattels, and things whatsoever, of what nature or value soever, for the better support and relief of the poor under their care. And also to sell, grant, demise, exchange, and dispose of any of the same manors, messuages, lands, rents, tenements, and hereditaments, whereof or wherein they shall have any estate or interest. And with full license, power, and authority to any person or persons, bodies politic or corporate, their heirs and successors respectively, to give, grant, sell, alien, assign, devise, bequeath, or dispose of in mortmain, in perpetuity or otherwise, to, or to the use and benefit of, or in trust, for the governors of the London hospital, and their successors and assigns, manors, messuages, lands, tenements, rents, hereditaments, annuities, sum and sums of money, goods, and chattels whatsoever, not exceeding the yearly value of 4000l. above all charges and reprises for the charitable purposes above-mentioned, in any manner not repugnant to, or made void by the statute passed in the 9th of Geo. II. c. 36.

Foundling Hos. The Foundling hospital was established at the instance of *Thomas Coram, Esq.* by royal charter, in 1740, and incorporated by the style of "The Governors and Guardians of the Hospital for the maintenance and education of exposed and deserted young Children:" the powers

powers of the charter were enlarged and confirmed by an act of parliament of the same year, whereby the governors are empowered to purchase and hold lands to the value of 4000*l.* *per annum*, and their land-tax is not to be raised above what was paid in 1739, notwithstanding improvements. The children received and educated there gain no settlement; and the house and premises are exempted from parish fees of christenings and burials: the corporation may have a chaplain, &c. and conveyances are to be approved by the lord-chancellor, &c. 13 G. 2. c. 29.

In 1742, the buildings were begun in Lamb's Conduit-fields; one wing was finished in 1745; the chapel was begun in 1747, and the other wing in 1749. Parliament gave them 10,000*l.* in 1756; and a further sum of 30,000*l.* in 1757, besides some subsequent grants. 29 G. 2. c. 29. sec. 13. 30 G. 2. c. 26. sec. 14.

Magdalen Hospital.

The Magdalen hospital, for the reception, maintenance, and employment of penitent prostitutes, was founded in the year 1758, by several persons, in Prescot-street, Goodman's-fields, where its support, and the number of applicants for reception, so much increased in the space of ten years, that it became necessary to remove it. *Robert Dingley* and *Philip Milloway*, Esqrs. were seized in fee-simple of six acres of land, lying dispersed in the open and common fields called *St. George's-fields*, in Surrey, in trust, for the purpose of erecting a new hospital there, but they had not power to make such exchanges as were necessary to possess the whole in one plot; and divers persons had a general right of common for their cattle at certain times in the year upon these six acres, promiscuously with other lands in the same fields, which right was sufficient to prevent their building: they therefore were empowered, by an act of incorporation in 1769, to admit all persons who should pay at any one time to the treasurer 21*l.* or a yearly sum 9 G. 3. c. 31.

of 5l. 5s. or more, and all persons who should be appointed by any general court, to be governors; and the president, vice-president, treasurer, and governors, to be one body corporate and politic in deed and in law, by the name of "the president, vice-president, treasurer, and governor of the Magdalen hospital, for the reception of penitent prostitutes," to sue and be sued, to have, hold, &c. in trust, for the benefit of the said hospital, all such sums of money as had been, or should at any time be paid, given, devised, or bequeathed, and without license in mortmain, to purchase, take, or receive any lands, tenements, or hereditaments, or any estate or interest arising or derived out of any lands, tenements, or hereditaments, for the purposes aforesaid.

Sect. 2. It is also provided, that the secretary, chaplain, physician, surgeon, or apothecary, or any inferior officer of the corporation, shall not, during his continuance in office, act as governor at any court or committee; and that no patient or servant shall acquire any parochial settlement by admission or residence there.

Sect. 9, 10. All right of common was then extinguished, and full power given for all such exchanges of lands, as should be necessary for the benefit of the hospital.

17 Geo. 3. c. 71. 1777. An act for enabling the feoffees and trustees of an estate in Middlesex, given by *Lawrence Sheriff, Esq.* for the founding and maintaining a school and almshouses at *Rugby*, in *Warwickshire*, to sell part of their estate, or to grant leases of the whole or any part of it, to purchase in mortmain, not exceeding 100l. per annum.

Rugby School. Ante. 328.

Downing College. Downing college, established by his majesty's charter, dated 22d of Sept. 1800, for the erection of which a piece of land, called Doll's Close, was purchased and conveyed to trustees, but in the following year it appeared that

that it would be preferable to erect the college on a different spot; and upon application to parliament, an act was passed, enabling them to purchase a new scite of ground, under the direction of the court of Chancery, and then to dispose of Doll's Close, and for these purposes to raise money on mortgage. 41 Geo. 3. ch. cxl. Sec. 7. See Ante. 204. 212.

A bequest to a society for *increasing clergymen's livings* in England and Wales was held to have been intended only for Queen Ann's bounty, as that society answers this description; and as all their funds are laid out in land, the bequest was void by the statute of mortmain. 3 Vez. jun. 784. Middleton Clitherow, 1798.

By 43 Geo. III. c. 107. after reciting the act of Queen Ann for the augmentation of the maintenance of poor clergy, enabling the governors of Queen Ann's bounty to take gifts by deed inrolled in the manner prescribed by the statute of 27 Hen. VIII.; and that the operation of this act was considerably obstructed by the statute of 9 Geo. II. c. 36. enacted, that so much of the act of Queen Ann as is therein-mentioned, should remain in full force, notwithstanding the said statute of Geo. II. Ante. 75. 78. 181. Queen Ann's Bounty.

It also extended the power of 1 Geo. I. for the exchange of lands and messuages to those belonging to augmented livings; and in order to promote residence, the governors were empowered to lay out money in these lands in building, rebuilding, or purchasing convenient and suitable residence for the minister, and for vesting it for ever to that use. And by the act of 43 Geo. III. c. 108. which immediately followed, all persons having any estate, real or personal, by deed inrolled in England, according to 27 Henry VIII. and in Ireland by 10 Car. I. or by will, duly executed, three calendar months before the donor's decease, were authorised to vest the same, not exceeding five acres, or of personal estate,

estate, not exceeding 500l. towards erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the united church shall be observed, or any mansion-house for the residence of any minister of the said united church, officiating or to officiate in any such church or chapel, or of any out-buildings, offices, churchyards, or glebe, and to be applied according to the will of the benefactor with the approbation of the ordinary; and in default of such direction, in such manner as the patron and ordinary shall direct with consent of the incumbent; with full capacity to purchase and take, as well from the donors as from the venders, any lands or goods, without any license or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law notwithstanding; but this is not to extend to enable any minors, insane, or femes covert, without their husbands, to make any such alienations.

F. N. B. 222. Dyer, 9. Vaughan, 345, 356.

That no more than one such gift shall be made by any one such person; and if they exceed the above value they shall be valid only for so much; and the lord-chancellor may, on petition, reduce the gift and allot the land.

No glebe, containing upwards of 50 acres, shall be augmented with more than one acre, and any excess shall be reduced in like manner.

Power is also given to grant or exchange, and hold any lot of land not exceeding one acre, lying contiguous and convenient, to be annexed to any church, chapel, or house of residence.

45 G. 3. c. 84. And in 1805, by a subsequent statute, the bishops are directed to enquire and certify to the society the value of benefices, and return the result of their investigation into the exchequer; and the society are empowered to act as they were before enabled respecting livings not returned into the exchequer; but this is not to alter or affect such certificates,

certificates as were so returned, for ascertaining what livings were to be discharged from first fruits and tenths, so far as they relate to first fruits and tenths.

And in order to facilitate the intentions of all persons who might be disposed to contribute to the augmentation of such livings as are within the object of the bounty, this act empowers all persons having in their own right any money or personal estate whatsoever, at their will or pleasure to give or vest the same in the society, to be by them disposed of according to law, without any deed, either inrolled or not inrolled, as they could have done by deed inrolled or otherwise before this act; but this statute does not extend to alter or affect the law in force respecting the gift or conveyance of lands by any deed, or the disposition thereof, or of any personal property by will.

The society has been noticed, and its interests regarded by several subsequent statutes not immediately relevant to the object of this work.

CHAP.

CHAP. III.

OF ADVOWSONS.

9 Geo. 2. c. 36. Sect. 5.

No College which doth or shall hold so many Advowsons, &c.] Advowson is an incorporeal hereditament, and consists of the right of presentation to a church or ecclesiastical benefice: and he who has this right is the

2 Bl. Com. 21. 1 Inst. 119.

patron. For when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common (from whence arose the division of parishes) the lord who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased, provided he were canonically qualified to officiate in that church of which he was the founder, endower, maintainer, or in one word, the patron.

Gibs. 756. 3 Smith's W. Na. 160.

The present universities of Europe were originally, the greater part of them, ecclesiastical corporations, instituted for the education of churchmen; they were founded by the authority of the Pope, and were so immediately under his protection, that their members, whether masters or students, had all of them what was then called the benefit of clergy, that is, were exempted from the civil jurisdiction of the countries in which their respective universities were situated, and were amenable only to the ecclesiastical tribunal. Edw. I. the English

4 Bl. Com. 426.

Justinian, according to Sir Matthew Hale, made effectual provision for the recovery of advowsons and presentations

to

to churches as temporal rights, in which, before, the law was "infinitely lame and defective" by Stat. West. 2 c. 5. 13 Edw. I. c. 5. A. D. 1285. Hale's Hist. C. L. 154. by Serj. Runnington.

In 7 R. II. a statute was made (c. 12.) for the restraint of aliens to take any benefices or dignities ecclesiastical, or farms or administration to them without the king's special license, upon pain of the statute of *provisors*, which being remedied by a former statute, where the alien took it to his own use; it is by that statute remedied, where the alien took it to the use of another; though probably it might be intended, if any other purchased to the use of an alien; and that the words, "as to the use of another," should be "or any other to his use." In 15 Rich. II. c. 5. a statute was made for the relief of lords against mortmain, where feoffments were made to the use of corporations; and an ordinance was made, that for feoffments past the feoffees should before a day either purchase license to amortise them, or aliene them to some other use, or other feoffments to come, or they should be within the statute of mortmain.* Lord Bacon's Reading on Statute of Uses, by Rowe, 26.

As the statutes of mortmain had prevented the clergy from having the land itself, it seems likely, since they were masters of the civil law, that the *usus fructus* of that law suggested to them the possibility of their still being able to have the benefit of the land, although they were debarred from having the land itself; and that the plan which they hit upon was, to take shelter under the laity, and get feoffments made to laymen for their own use; and by that mean they enjoyed the profits of the land; but still they had no mode of enforcing an execution of the trust which had been reposed in the feoffee. Rowe's Lord Bacon on Uses, 92.

* Uses are of a very ancient date indeed, even before the statute of Mortmain.—Rowe's Notes on Lord Bacon, 109.

The

The same observations are in many respects applicable to advowsons.

Dr. A. Smith, who speaks without any extraordinary bias in favour of the universities, says, that "the charitable foundations of scholarships, exhibitions, bursaries, &c. necessarily attach a certain number of students to certain colleges, independent altogether of the merit of those particular colleges, were the students, upon such charitable foundations, left free to choose what college they like best, such liberty might perhaps contribute to excite some emulation among different colleges."

3 Smith's W. N. 155.

But to this it may be remarked, that the right of presentation to benefices, which has been vested in or purchased by many colleges offers a considerable stimulus to this laudable emulation; and to have finally rewarded the labours of men who have proved ornaments to the English church.

3 Smith's W. N. 160.

Advowsons being an inheritance incorporeal, and not lying in manual occupation, cannot therefore pass by livery, but may be granted by deed or will; but this does not extend to ecclesiastical persons who are seized of advowsons in right of their churches, nor to masters and fellows of colleges, nor to guardians of hospitals, who are seized in right of their houses; and who are all entitled to their writs of *darien presentment*, &c. By 13 Ed. I. st. 1. c. 5. s. 4. all these being restrained (the bishops by 1 Eliz. c. 19. and the rest by 13 Eliz. c. 10.) from making any grants but of things incorporeal, of which a rent or annual profit may be reserved; and of that sort advowsons, and next avoidances which are incorporeal and lie in grant, cannot be. And therefore such grants, however confirmed, are void against the successor, though they have been adjudged to be good against the grantors, as bishop, dean, master, or guardian, during their own times.

1 Burn. Eccl. 9.

an

An advowson *in esse* is different from the patronage of an hospital newly created; for the land or an advowson no desultory kind of inheritance can be limited without act of parliament; because then he who had the right could not always know against whom to seek his remedy; but of the patronage of an hospital newly founded, there can be no precedent right, and therefore at the very first institution it may be limited as the king pleases, like the case of a rent *de novo*. 1 Ca. Cha. 214. 23 Car. 2. Atkin v. Montague.

The statute 12 Ann. st. 2. c. 12. which forbids the purchase of advowsons, is held to be confined to clergymen only, either as to purchasing themselves, or in the name of any person in trust for them; all other persons, therefore, continue to purchase next avoidances, as they did before, and to present to the living, without fear of the consequences attached to simony. 1 Burn. Eccl. 9.

From all these considerations, but particularly as advowsons are heritable property, they are also devisable; and as the presentation is entirely incorporeal, and derives no return out of the profits or rents of land, so as to savour of the realty, I am inclined to think that such a bequest to any charitable society would be maintained by the court; and this with more certainty, if the charity were incorporated; because in that case its permanence would preclude any doubt about there being always an existing patron to present a new clerk upon every avoidance, without the danger of lapse.

By the *fifth section* of the statute 9 Geo. II. c. 36. colleges which were possessed of as many advowsons of ecclesiastical benefices as were equal in number to one moiety of the number of their fellows or students upon the foundation, were rendered incapable of purchasing, receiving, or holding any others, except such as were given for the benefit of the headships thereof.

This

This was provided lest the successions should happen so rapidly, as that fit members might not be left either to govern the college, or to succeed to the vacant benefices. But it was found, after the experience of nearly seventy years, that the restriction rendered that succession too slow; and that the removal of it would have a tendency to promote learning, and to provide a better supply of fit and competent parochial ministers; it was therefore repealed in 1805.

45 Geo. 3. c. 110.

The extent, however, of this clause, and indeed of the whole statute, having undergone a very full discussion before Lord-keeper *Henley*, in 1757, upon the case of Mr. *Tancred's* will, it may not require an apology for retaining, from the first edition of this work, that case at length, however it may be affected by the late act of 45 Geo. III.

1 Black Rep. 90. Amb. 351.

Mr. Tancred, by deed in 1721, conveyed his estate to feoffees to the use of himself for life, remainder to his first and other sons in tail, remainder to *certain officers* of Christ's college, Cambridge, to maintain certain students there, in the sciences of physic and divinity, and four students of the law at Lincoln's Inn, and also certain pensioners, viz. decayed merchants, soldiers, and clergymen, who should reside in his capital house at Wicksley. By his will in 1746, duly executed, he confirms this deed; but fearing the statute of *mortmain* of 9 Geo. II. might defeat the uses thereof, he orders that in case the said uses or any of them should be contrary to law, the estates so settled should go to the *fellows* and *scholars* of Christ and Caius college, to be divided in certain proportions for the augmentation of their stipends. On an information to establish this charity, at the relation of Christ college, against the heirs-at-law, there arose two questions:

1. Whether

1. Whether this was a conveyance to charitable uses under the statute of Elizabeth, and therefore to be aided by this court?

2. Whether it fell within the purview of the statute of mortmain, 9 Geo. II. and was therefore a void disposition?

Per *Henley, Keeper:*—The conveyance of 1721 is admitted to be defective; the use being limited to certain *officers* of the corporation, and not to the corporate body: and therefore there is a want of persons to take in perpetual succession.

The only doubt is, whether the court should supply this defect, for the benefit of the charity, under the statute of Elizabeth. And I take the uniform rule of this court before, at, and after, the statute of Elizabeth, to have been, that where the uses are charitable, and the *person has in himself full power to convey*, the court will aid a defective conveyance to such uses: thus the devises to corporations were void under the statute of Henry VIII. yet they were always considered as good in equity, if given to charitable uses. There is here no doubt of Mr. Tancred's power to convey, and the uses are truly charitable and truly proper in themselves, the education of poor scholars in the university, students at the inns of court, and poor persons in his own house. Therefore, however unbecomingly Mr. Tancred expressed himself in his will, with respect to his relations (and indeed he seems to have cast off all natural affection), and however reluctant I may be to establish a disposition made under this turn of mind, yet sitting here judicially, I am obliged, by the uniform course of precedents, to assist this conveyance; and more especially, because it is the peculiar province of a court of equity, to protect men in the freedom of disposing of their property, which

34 and 35 H. 8. c. 5.

Court will assist a defective Conveyance to Charitable Uses.

is a point of the utmost importance in a trading country. This conveyance, therefore, being established under the statute of Elizabeth, we are next to consider how it is affected by 9 Geo. II.

Mr. Tancred, by his will, makes a disposition by way of substitution: "In case the dispositions are within "the statute of *mortmain*, then to the fellows, &c. of the "two colleges." The relators admit, that part of the disposition is void with regard to the pensioners and law students; but then they contend that the substitution must take place by reason of the exception of the universities and their colleges in the statute. The defendants (the heirs-at-law) contend that all is void, as well the substitution as the original uses; because the devise is not to the body corporate, but only to the particular fellows in their personal capacity. No cases have been cited on either side: we must therefore form an original construction of this clause in the statute of *mortmain*. And my opinion is, first, that this is a devise for the benefit of the whole body corporate: secondly, had it not been so, I should still have thought that the legislature intended, by the *exception* in the statute, *to save a devise for the benefit of particular members*, as well as of the whole body. The legislature meant to except such devises as were really and bonâ fide *for the benefit of colleges*; not those in which the legal interest only passes to the college, in *trust* for *other* charitable uses; for then the statutes of *mortmain* might be defeated every day. And this devise is for the benefit of the whole society, even of the master himself, who must pass through a fellowship, and partake of Mr. Tancred's bounty in his progress towards the headship. Besides, we all know that, in these houses of education, any encouragement for youth to enter into a particular college,

Exception as to Universities was for their benefit, not to make them trustees for other uses.

college, is a general benefit of profit to the whole society.

The legislature has thrown no restraint on these gifts when made to the body corporate of either university, or to colleges already established there; intending not to increase the number of foundations, but to have those better endowed which are already established. They judged that leaving this path open, would not for some time be liable to much inconvenience: but when they saw an inconvenience, they restrained even gifts to colleges. Livings are grantable to these bodies, only till they amount in number *to a moiety* of the fellows; lest, if the succession be rendered too rapid, there should not be persons left of a sufficient age, temper, and discretion, to govern the society, and answer the great purposes of the foundation. This devise to the fellows and scholars contains no circumstances that intimate any intent to give *them* the estate in their personal capacities. It is clearly to them, as members of the body corporate, for the perpetual augmentation of the revenue of themselves and their successors.

Therefore his lordship decreed the disposition to the pensioners and law students void, under the statute of *mortmain*; but he established the exhibitions to the students in divinity and physic, and directed the substitution to take place for the benefit of the fellows and scholars of *Christ* and *Caius* colleges, in their corporate, not their natural capacities.

In another case, *Whorwood* devised the remainder of his real and personal estate to *University College, Oxon.* and by a codicil directed that the senior fellow should be possessor of all his estate, reside in his house *hospitably*, and sometimes *give entertainments* to the poor, &c. A devise to a college generally for their benefit, to 1 Vezey, 537.

increase the foundation, to augment a headship or fellowship, or found a new one, is a laudable charity, and deserves encouragement; and therefore they were excepted out of 9 Geo. II.—But this is not a devise of that kind for academical or collegiate purposes: but only to establish somebody to live at his house for ever, and to make his estate unalienable: answering no good purpose to the college or the public.

Atty. v. Green. 2 Br. 492.

Dr. Radcliffe, by will, 13th Sept. 1714, devised his manor of Linton, and other hereditaments in Yorkshire, to his executors and their heirs, in trust, to pay thereout yearly 600l. to two persons, to be chosen out of the university of Oxon, where they are masters of arts, and entered on the physic line, for their maintenance, &c. as travelling fellows; and the yearly surplus, for ever, for buying perpetual advowsons for the members. He then charged several annuities on his Bucks estate, and gave his lands in Bucks, &c. and all his real and personal estate charged with said annuities, &c. to his executors, their heirs, &c. and willed that all the residue and surplus thereof should be applied by them to such charitable uses as they, in their discretion, should think best, but no part to their own use: and desired that, if it could be done in law, his Yorkshire estate should be conveyed and settled by his executors on the master and fellows of University college, for ever, in trust, for the performance of the uses therein before declared.

An information had been filed, and decree made, in 1716, that the trustees should convey the Linton estate to the college; which had been done. The estate for long time did not produce more than would pay the travelling physicians; but at length producing a surplus, the college, in obedience to the will, purchased advowsons

advowsons till they possessed as many as the statute of mortmain, 9 Geo. II. would allow; *i. e.* a number equivalent to that of a moiety of the fellows. A surplus still continuing to arise, the college (under the idea that they could not purchase more advowsons) laid out part in increasing the value of the already purchased livings, and in adding to the income of the headship of the college.

Repealed absolutely by 45 Geo. 3. c. 101.

The present information was filed against *Green*, the heir-at-law, and the college, praying a proper application of the surplus profits not laid out in the purchase of advowsons under the will.

The heir-at-law claimed the surplus as undevised, and therefore a resulting trust for him. The college submitted, whether, the devise being before the mortmain act, they might not purchase advowsons, though to a greater number than that of a moiety of their fellows: if not, insisted the surplus should be applied to other uses for the benefit of the college, as being the nearest possible application to the intent of the testator.

The question was, whether the operation of the statute of mortmain, 9 Geo. II. can defeat this devise to the college, by raising a claim either on the part of the heir-at-law, or of the crown?

The court, on finding a charity inapplicable to the intended uses, has never from thence raised an use for the heir-at-law: he was, in all events, intended to be disinherited. The court has therefore applied the fund to other charities as nearly as possible to those intended by the testator, as by increasing the number of objects where the property has exceeded the number proposed. —As in cases of alms-houses; Thetford school case, 8 Co. Rep. 130; Duke, 78, &c.

Where the charity cannot take place in the same form, it shall as nearly as possible, and not go to the heirs. *Attorney* v. *Guise*, 2 Vern. 266; *Aylet* v. *Dodd*, 2 Atk. 238; *Attorney* v. *Baliol college*; *Attorney* v. *Johnson*, Nov. 1753, an increase of tythes devised to charity was decreed to extend the charity, and not go to the heir.

Attorney v. *Hoare*, 1779 and 1783. Real and personal estate were devised to pay annuities to six scholars, and to purchase advowsons for Jesus college.—In 1717, the court decreed that the heir should execute conveyances to trustees, for the uses of the will.

On a rehearing, a balance in the hands of receivers was ordered to be applied to the use of the college. It was now stated, that the college had purchased as many advowsons as the act allowed, and that the heir had never made the conveyance decreed: the information was filed against the then heirs-at-law, and prayed that the profits might be laid out for the benefit of the college. On the cause being heard in 1779, the accounts were directed; and on further directions in 1783, the heirs-at-law claimed the surplus of the rents, relying on what Lord Coke says, as to the heir of the founder taking, on failure of a monastery. Decreed that the heirs should convey to such persons as Dr. Hoare should appoint, having a day given them to shew cause, and that the college should lay a plan before the master: so that the decree was complete against the heir-at-law.—*Attorney* v. *Arnold*; *Shower's Parl. Cases*, 22; *Baylis* v. *Church*, 2 Atk. 239; *Wheeler* v. *Shear*, Mosely, 288; and *White* v. *White*, 1 Bro. 12, were also cited on the same side.

Second point, as to the restriction by the statute from purchasing a greater number of livings, &c.—

But

But that point was not finally determined in the case, and, upon the fairest construction of the statute, does not appear to be the meaning of the clause. The statute was only to operate upon gifts after 24th June, 1736, and all gifts previous to that time have been held good. The clause as to the number of advowsons is restrictive of the exception of colleges, as being able to hold advowsons; it cannot therefore be held to be a prohibition of colleges having more advowsons than amount, in number, to a moiety of their fellows, but only to restrain their taking more by future gifts. If *other* had meant *more*, colleges having already more advowsons than the moiety of their fellows, must have lost so many of their advowsons as exceeded that number, which certainly was not the case. The statute therefore did not mean to diversify their right to hold advowsons obtained by any former act, or which they possessed at the time. This will, being made before the statute, is not affected by it. In this case it is purely by accident that the event has happened after the statute, by the increased rents of the property; but the case must be the same as if it had been a gross sum given previous to the statute, to be laid out in advowsons. Suppose it had been so, and the money had not been laid out, from proper purchases not offering, the money might be laid out notwithstanding the statute. The disposition might still have been legally made of the money: money to be laid out, in this court is considered as done; as in the case of money to be laid out in land, it is considered as land.

The college, however, thinking themselves restrained from purchasing more advowsons, had laid out the money in the increase of livings already purchased, as being a purpose the most analogous possible to that

which the testator intended; and by adding to the value of the headship.

1 Vezey, 534. *Attorney* v. *Whorwood* was cited at a subsequent hearing, as deciding, that where the regulations imposed were inconsistent with the rules of the charity, it would be a resulting trust for the heir-at-law. On the other hand it was contended, that whatever was not given to the charity went to the residuary legatee, there being an express intention in the testator to dispose of every thing: and cited 8 Mod. 222, and MSS. case, *Goodright* and *Opie*.

Lord *Thurlow*, chancellor, said, the point in question was with respect to the charity itself. The court had had a plan laid before it: supposing the whole object of the charity to fail, and yet that the estate is by the will appropriated to charitable uses, still the will is a clear exclusion of the heir-at-law. It is under this idea, that many charities have been disposed of under the privy seal. Is then the heir disinherited?—He is to claim a trust not resulting from the will, but from the act of the legislature. If there be any case where the heir-at-law is disinherited, it must be that where the devise was good at first. In the first decree, the devise was held up till the license to hold in mortmain should be obtained. So it was held by Lord *Camden*, in the *Downing* college case, which license had not then been obtained. Considering the words of the last clause of the act, it is difficult to make it out that there is such a limitation as is contended for; but it has been so constantly understood the other way, that I do not think myself warranted to hold a different opinion. I do not see why some arrangement should not be made, by way of exchange of advowsons; but it is not necessary to declare that now. If that should

should fail, the question between the general trustees and the heir-at-law will then arise. I confess it will be difficult to obtain it for the heir-at-law, and perhaps as difficult for the general trustees. If all those should fail, it may be a question, whether it is become fiscal, or will go to the heir-at-law as resulting to the founder.

CHAP.

CHAP. IV.

OF SCOTLAND.

9 Geo. 2. c. 36. sect. 6. Scotland, &c. exempted.

Nothing shall extend, &c. to Scotland.] The *last section* of the act exempts all estate real or personal in *Scotland*, from the restraints already imposed on those in England.

1754. Provost of Edinburgh v. Aubery. Ambl. 236.

The court of Chancery of England has no jurisdiction to enable it to give any directions for the distribution of a legacy of stock bequeathed for the maintenance of poor labourers in Edinburgh, which belongs to the courts of Scotland; and therefore, in such a case, the stock was ordered to be transferred to such persons as the parties should appoint, to be applied to the uses of the will.

1 Bro. Cha. Rep. 271.

There is a case already cited in page 155, where an estate in *Ireland* was devised to charitable uses in Ireland. I have met with none, where estates either in Scotland or Ireland were devised to charities in England; though it is presumed, if the charities were incorporated, and so become capable of taking, such a devise would not be void by the former clauses of this act. Upon the same principles, a devise of lands, or of a rent charge on lands in the West Indies, to a charity in England, is good. Instances of the latter have occurred, and the executors or heirs-at-law never thought of contesting the devise against the charity.

OF

MORTMAIN

AND

CHARITABLE USES.

PART III.

OF SEVERAL INCIDENTS TO COLLEGES AND CHARITABLE INSTITUTIONS.

CHAP. I.

OF VISITATION.

THERE is no constitution established in society, without a power being vested somewhere, either declared or implied, for redressing its grievances or abuses: in nations this power generally belongs to the party invested either with the legislative or the executive branch of government: in inferior communities, it often depends on the will of their founders, not repugnant to the laws of the land; or when this is not declared, the right devolves upon the executive power.

There are two sorts of corporations: 1. Those that are for the public government; and, 2. Those that are for private charities: the first of these are governed by the common

common, law, but the second is the creature of the founder, and governed by his private laws—not that the particular persons are exempted from the common law, but the body in general is; and as these are private laws, they are in the nature of trusts, and the breach of them is not a crime cognizable by the common law.

Rex v. Bentley. Fortescue, 299. 12 Geo. 1. K.B.

The king's power of pardoning arises from his having the executive power in him; and though the king may be founder, yet the breach of his private statutes is not a crime against the crown; crimes pardoned are such as are against the public laws and statutes of the realm, whereas these are in the nature of domestic rules, for the better ordering of a private family: and although the violation of the statutes may be done by several in conjunction, yet each are punishable in his individual capacity (as in the case of every Tort), and prohibition will not on that ground lie against the visitor.

Powers given to an office and to successors, without name, vest in the successors, without the words "for the time being." When the crown has appointed a general visitatorial authority, and the party afterwards acts as a special visitor, under the statute of 43 Eliz. a prohibition will lie from K. B.; for being before appointed general visitor, there remained no further power in the crown with regard to enlarging the visitatorial authority.

Bentley v. Bp. of Ely. 1 Barnard. 192. 1729.

Wherever a visitor proceeds contrary to his citation, or inflicts penalties different to those which the statutes prescribe, the court of K. B. always grants a prohibition.

Whether a visitor can alter former statutes, without express authority so to do, has not been authorised by any determination, however the practice may have prevailed; and I think prohibition will lie in such case.

Royal

Royal foundations, as deans and chapters, are not visitable by the bishop. 1 Mod. 27. Fortescue, 319. 10 Geo. 1.

Archbishop Laud, in the reign of Cha. I. agitated in the royal presence, at Hampton court, the question of his right of visiting the universities; and after solemn debate of his claim, in which he took a considerable part, it was finally settled that he should visit them metropolitically, namely, the body of the university, and every scholar, for his obedience to the doctrine and discipline of the church of England—and not to meddle with the statutes of the colleges or university, or particular visitors of any college.

The archbishop, in exercise of this power, visited Merton college, in 1638, and adjourned his visitation to Lambeth, in October following. Rushworth's Hist. Col. A. D. 1636. p. 324, &seq.

The right of the archbishop has been acknowledged, with the reservation of the king's superior right.

The power of a visitor is arbitrary, and yet conclusive in the first instance; all fundatory rights arise from the property of the donor: a founder has the nomination of his visitor, and unless he dispose of this power, it remains to his heirs; and if he die without heirs, it goes to the crown. Whosoever is made patron has the same power as the founder, and where the patronage descends to the heir, he has the power of a founder *eo nomine* as patron; for the patronage is said to draw all things with it. And therefore it is, that where once a visitor, legally authorized by the founder, hath given judgment, no court can interfere with it. See the references in the margin, where the powers of deprivation are well defined. 2 Vezey, 328. 1 Burn Ecc. Law, 426. Skin. 645. Atty. v. Butler, Ibid. 482. 500.

A founder, or his heirs (if he does it not), may make a visitor; may give him partial or general powers; if partial ones, and he exceeds them, that excess becomes a nullity, and lets in the law; and the court, whether they can 2 P. Wms. 326. And see further, 1 Vezey, 472. Green v. Rutherforth.

can give relief or not, will see that these jurisdictions keep within their bounds, and will grant a prohibition, where there is such excess of power, as well as where there is no power at all. For though the king's courts cannot interfere with regard to the private statutes of the society as established by the founder; yet as to the public laws of the land, they may; for over these the founder could give to the visitor no exclusive jurisdiction.

1 Burn Eccl. Law, 417.
4 Mod. 233.
Viner Mandamus, H. II.
Str. 1139.

The power of a visitor, though a summary one, is certainly very convenient: the exercise of it is in no case more so, than in that of elections. When the proprieties and disqualifications of candidates are to be determined, it is obvious what confusion would be made, if these were to be determined by the common law, and the party who had the right, were kept out of the profits in the mean time.

St. John's Coll. v. Toddington.
1 Burn. Eccl. Law, 429.

It was formerly held, that if the hospital be *spiritual*, the bishop should visit; if *lay*, the patron. This right of lay patrons was indeed abridged by 2 Hen. V. c. 1. which directs, that the ordinary should visit *all* hospitals founded by subjects; but the king's writ was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by 14 Eliz. c. 5. which directs the bishops to visit those hospitals only, where no visitor is appointed by their founders: and all the hospitals founded under 39 Eliz. c. 5. are to be visited by such persons as shall be nominated by the respective founders; and if they do not appoint, then by the bishop of the diocese. It was laid down as a rule, that where the king is founder, he and his successors are visitors; but where a private person is founder, there such private person and his heirs are, by implication of law, visitors; who may substitute their visitatorial power to

Year Book. 8 Ed. 3. 28. 8 Ass. 29.
1 Bl. Com. 482.
2 Inst. 725.
2 P. Wms. 326.
Eden v. Foster.
2 P. Wms. 325.
2 P. Wms. 326.

to any other person, or his heirs: but where the founder appoints no special visitor, the visitatorial power results to his heir. And the commissioners instituted by 43 Eliz. c. 4. had power to visit, in case the visitors appointed by the donor misbehaved (but here the power of the ordinary was still reserved); for it would be unreasonable and of mischievous consequence, that where governors are appointed, these, by construction of law, and without any more, should be visitors, have an absolute power, and remain exempt from being visited themselves: and therefore in those cases where the governors or visitors are said *not to be accountable*, it must be intended where they have the power of government only, and not where they have the legal estate, and are entrusted with the receipt of the rents and profits; for to be unaccountable in such a case, would be such a privilege as might of itself be a temptation to a breach of trust.

2 Wil. 325. 2 Vezey, 552. Duke, 69. 2 P. Wms. 326. See Duke, 68. 69.

And although in many charities, some of the governors are appointed by the rules and orders to be visitors, yet the word *governor* does not of itself imply *visitor*, or give any power of visitation; but they are not, having the legal estate vested in them, therefore excluded from being visitors: such a forced construction might prove of very great prejudice to the charity; and besides, would be making either a charter of incorporation, or a founder's liberality, of double intent, which ought not to be. And in general where governors happen to unite the capacity of visitor in the same person, it is for the management of the house or affairs of the charity; and then they remain accountable to the king's courts for the estates and revenues which may come to their hands: and a commission under 43 Eliz. c. 4. may be issued to call them to account.

1 Vezey, 418. 2 Vezey, 329, 552. 10 Co. 31. 2 P. Wms. 327. Str. 797. 2 P. Wms. 327. 3 Atk. 164. 2 P. W. 325. Eden v. Foster.

Since the 43 Eliz. where there is a charity for the particular 2 Vezey, 328.

Atty.-gen. v. Middleton. 1751. 2 Vezey, 559.

ticular purposes therein mentioned, and no charter, unless particularly excepted out of the statute, it must be regulated by commission; but where there is a visitor it is otherwise. But there may be an application to the court, founded on its general jurisdiction; and that is from necessity, because there is no charter to regulate it, and the king has a general jurisdiction of this kind: there must be somewhere a power to regulate: but where there is a charter with proper powers, there is no ground to apply to the court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rule of law. It has been determined, and expressly in the case of the *Birmingham school*, that there is no technical form of words for granting a visitatorial power, but it may be by any words of that meaning.

2 Vezey, 505. Atty.-gen. v. Corp. Bedford.

New College, Oxford, had, by a charter, particular powers given them as to the grammar-school at *Bedford*, such as removing the master for misbehaviour, &c. As to any thing of that kind, Lord-chancellor Hardwicke thought, it would be too much for the court to do any thing, though they were not appointed general visitors: but as to the management of the revenue of the school, the court might; and interposed and rectified an abuse therein accordingly.

3 Burn. Eccl. Law, 312.

Schools and colleges are said to be under similar restrictions as to their visitors. Colleges in the universities, whether founded by the king or any other person, are yet to be considered as private establishments, subject only to the founder, and to the visitor whom he appoints. The whole difficulty in coming to this decision seems to have been, to determine whether they were of a public or private nature: and though the courts have granted that such institutions are of a public nature as are constituted

Ld Raym. 5. 4 Mod. 106. Skin. 447.

stituted by the crown, and for public government, and are subject to the jurisdiction of the king's courts of common law; and for that reason have granted mandamus to restore a school-master of a grammar school; yet if they are judged matters only of a private charity, then they are subject to the rules and statutes of the founder and his visitor, and no other. Str. 58. 1 Vezey, 89. Duke, 68, 69.

Visitation was not introduced by the canon law, but of necessity was created by the common law. Patronage and visitation both rise from the founder; and the office of the visitor by the common law, is to judge according to the statutes of the college (or charity), and to expel and deprive upon just occasions, and to hear appeals of course: and from him, and him only, the party grieved ought to have redress; and in him the founder hath reposed so entire a confidence that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. 1 Ld. Ray, 6. 10 Rep. 28 a. Sutton's Hosp. 1 Wms. 206. 1 Mod. 82. Str. 798. Burr, 209.

A college is a temporal or lay corporation, of the same nature with an hospital, thus they are generally named together in the acts already cited: although corporations for public government, which have no particular founders or special visitors, are subject to the king's courts; yet corporations for charity, founded and endowed by private persons, are subject to the rule and government of those that erect them. But where the persons to whom the charity is given are not incorporated, there is no such visitatorial power, because the interest of the revenue is not vested in them; the king by his charter incorporates, and thereby grants to them the rights belonging to persons, as to legal capacity; colleges, although founded by private persons, are yet incorporated by the king's charter; but although the kings by their charters made the colleges to be such in Carth. 93. Skinner, 483, 493.

law, that is, to be legal corporations, yet they left to the particular founders authority to appoint what statutes they thought fit, for the regulation of them. And not only the statutes, but the appointment of visitors, was left to them, and the manner of government, and the several conditions on which any persons were to be made or to continue partakers of their bounty; all which constitute them of a private nature; and the courts of law will not interfere in the examination of any of their private acts.

2 Still. Ca. Exeter Coll. Stra 557. Ld. Ray. 1334.

Although the court of K. B. proceeded to take cognizance in Dr. Bentley's case, yet it was not to interfere with the visitor's power, but because no visitor was set forth in the return to the mandamus, to restore him to his degrees in the university of Cambridge. That court will always grant a mandamus to restore a person improperly deprived of his office, although the constitution of the society be established by charter, and confirmed by act of parliament, provided no visitor is constituted thereby; for if there is a visitor appointed, the party grieved may make his application there for redress: so if a mandamus is granted to restore a fellow of a college, and they return a visitor, though his sentence is irregular, yet it is not examinable by that court. It is the same as to a charity-school, where local visitors are appointed: if it is a private foundation, he and his heirs alone have a right, as to its internal government.

2 Atk. 108.

1 Mod. 82. 1 Lev. 93, 65. 2 Lev. 14 Ray. 56, 94, 100. Sid 94, 152, 346. Carth. 92. Str. 1139

The law is the same as to hospitals, as in Dr. *Merrick's* case, *Ayloffe's* case, *Appleford's* case, and *Parkinson's* case.

1 Burn. Eccl. Law, 429.

The court of K. B. requires to be certified, by the return to their writ, whether there is a visitor appointed by the founder or not; and will not admit evidence thereof by affidavits. A visitor for a particular purpose cannot,

cannot, because he is so, be a general visitor. But Lord Mansfield said, in the case of St. John's Camb. v. Toddington, That a founder may delegate his visitatorial power, either generally or specially: he may do this either by general words, or he may prescribe a mode for the exercise of any part of this power. But if a mode of visitation is prescribed in any particular case, that will not take away the general powers incidental to the office of a visitor; of which powers that of determining concerning elections hath been held to be one. No set form of words is necessary: you must look into the whole tenor of the statutes, to see whether the power be given, or intended to be given. A founder may split this power into a number of statutes for particular cases, and the court may consider upon the whole, who is general visitor, as in the case of *Clare-hall, Atty.-gen.* v. *Talbot*, 1747. It is clear a founder may appoint a visitor with general powers, and yet except particular powers in particular cases. To visit as ordinary, and to visit an eleemosynary foundation, are different things. If a founder appoint no visitor, it goes to the crown. The mode of donation is the law of it. And his lordship doubted whether a visitor can make any new statutes, unless power be specially given him for that purpose.

Ante. 398.

1 Vezey, 78.

The case of *Philips* v. *Bury* established the general principles which have since governed the courts of law on this subject; and this has since been recognised upon an application to the court of K. B. for a mandamus to the visitor of Peter-house college, Cambridge, to appoint one of two persons presented by the fellows to be master.

1 Ld. Ray. 5. Skin. 484. 2 T. Rep. 346.

1788. The King v. Bishop of Ely. 2 T. Rep. 290. K. B.

In general the court of King's Bench will not interfere in the case of a visitor, or review any determination made by him in that capacity; but as in this case the

bishop's right was restrained to the selection of one of the two persons presented to him by the fellows, who were by the statutes constituted the judges of their fitness, this was held to be a case not within the bishop's *general* visitatorial power: here he was restrained, and as to them had no discretion as a general visitor; he was merely to judge of the fitness of two persons nominated to him, and he was only to act ministerially.

To exercise a visitatorial power is a judicial act, and the visitor should therefore cite and hear the parties; he is not bound to proceed according to the rules of the common law; unless there be a general visitation appointed, there should be an appeal to him, and he should proceed on that appeal.

If a person be appointed visitor with specific powers, he is bound by the precise words constituting that power, and they will be construed strictly by the courts; but if he be appointed general visitor also, his authority becomes general, and extends beyond that limitation, as held by Lord Holt, in the case of *Philips* v. *Bury*.

1 Ld. Raym. 5.
2 T. Rep. 346.

As this was not a visitatorial act, it is impossible that the bishop's conduct could be inquired into by him as visitor, for this would be to determine upon his own right. A visitor cannot be judge in his own cause, unless that power be expressly given him. A founder, indeed, may make him so, but such an authority is not to be implied; he cannot visit himself: and where a visitor claimed an interest, and asserted a right in the appointment of a master, and that appointment was the act complained of, and the court of K. B. granted a mandamus. This may stand as a precedent in the case of superior officers, but it is not expected that the court will examine into the reasons for the amotion of a pensioner of an hospital, with the same nicety as if his freehold were in question

Rex v. Bp. of Chester.
2 Stra. 797.
1 Vezey, 471.
3 Atk. 164.
Atty. v. Lock. 1744.

question—but still the subject is cognizable there, and well deserves the court's minute attention.

Where his visitation is limited to be once in any number of years, he can only visit once in that time, unless called upon oftener by the college; and if he come uncalled within that time, his visitation will be void. But if a member expelled appeal to him, and he appoint a particular commissary to examine the case, this would not preclude his visiting again within the five years; for as visitor he has a standing constant authority, at all times, to hear and redress the grievances of the members; that is the proper office of a visitor; for visiting is one act in which he is limited to time, but hearing appeals, and redressing grievances, is his proper office and work at all times. The visitor's sentence is final, and the validity or ground of the sentence shall never be inquired into; and this will appear, if we consider the reason of a visitor, how he comes to be supported by authority in that office. Every man is master of his own charity, to appoint and qualify it as he pleases.

2 T. Rep. 818. Phillips.v.Bury.

Lit. s. 136.

2 T. Rep. 851.

And that we may the better understand, said Lord Holt, the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity.

Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land: if they make any particular private laws and constitutions, the validity and justice of them are examinable in the king's courts; of these there are no particular private founders, and consequently no particular visitor: there are no patrons of these; therefore, if no provision be in the charter how the succession shall

continue, the law supplies the defect of that constitution, and says it shall be by election; as mayor, aldermen, common-council, and the like; and so it was in
1 Rolls, Abr. 513. the case of the town of *Launceston*. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and therefore, if there be no visitor appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder. So it appears by the cases in *Yelv.* 65, and 2 *Cro.* 60, *Fairchild* and *Gaire*; where it is now admitted on all hands that the founder is patron, and, as founder, is visitor, if no particular visitor be assigned. And so is 8 *E.* 3. *Ass. Placit.* 29, 31. So that patronage and visitation are necessary consequents one upon another; for this visitatorial power was not introduced by any canons or constitutions ecclesiastical: it is an appointment of law: it arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behaviour of the members that partake of the charity; for it is fit the members that are endowed, and that have the charity bestowed upon them, should not be left to themselves (for divisions and contests will arise amongst them about the dividend of the charity), but pursue the intent and design of him that bestowed it upon them. Now, indeed, where the poor, or those that receive the charity, are not incorporated, but there are certain trustees who dispose of the charity, according to the case in 10 *Co.* there is no visitor; because the interest of the revenue is not vested in

in the poor that have the benefit of the charity, but they are subject to the orders and direction of the trustees. But where they who are to enjoy the benefit of the charity are incorporated, there, to prevent all perverting of the charity, or to compose differences that may happen among them, there is by law a visitatorial power; and it being a creature of the founder's own, it is reasonable that he and his heirs should have that power, unless by the founder it is vested in some other.

Now there is no manner of difference between a college and an hospital, except only in degree: an hospital is for those that are poor, and mean, and low, and sickly: a college is for another sort of indigent persons; but it hath another intent—to study in, and breed up persons in the world that have not otherwise to live; but still it is as much within the reasons of hospitals. And if in an hospital the master and poor are incorporated, it is a college, having a common seal to act by, although it hath not the name of a college (which always supposeth a corporation), because it is of an inferior degree; and in the one case, and in the other, there must be a visitor, either the founder and his heirs, or one appointed by him; and both are eleemosynary. A visitor being then of necessity created by the law (as 8 Ed. III. 69, 70), every hospital is visitable, either by the patron if a lay hospital, or by the ordinary if spiritual. He is to judge according to the statutes and rules of the college. He may expel, and (as in 8 Ass. 29, 31,) he may deprive. For it is agreed on all hands, that, *quatenus visitor*, he may deprive: if he be visitor as ordinary, there lieth an appeal from his deprivation: but if as patron, then none; that deprivation, whether by right or wrong, must stand good. Skinner, 484. 6 W. & M.

But it may be said the visitor hath no court, and it

is unreasonable to conclude a man by the sentence of one that hath no court. But it is not material whether he hath a court or not: all the matter is, whether he hath a jurisdiction; if he hath a jurisdiction, and cognizance of the matter and person, and he give sentence therein, his sentence must make a vacancy, be it never so erroneous: but there is no appeal, if the founder hath not thought fit to direct one. That an appeal lieth to the common law courts of England, is without precedent. It is plain, by all the authorities of our books, and by the way of pleading, that the cause of the visitor's sentence is not examinable: if a sentence of deprivation be pleaded, the cause need not be shewn: it is not traversable even in a visitation, when it is by the visitatorial power:—So is *Rastal. Entr.* fol. 1. 11 H. VII. 27. and 7 *Co.* 42. *Kenn's case.*

On the same ground the court decided in the case of the *King* v. *Bishop of Lincoln*, that where by the statutes of a college a visitor is appointed, who is to interpret the statutes, and an appeal is lodged with him, the court will compel him to hear the parties and form some judgment, though they will not oblige him to go into the merits; for it is sufficient if he decide that the appeal comes too late.—*Trin.* 25 Geo. III.

The distinction relative to which court has a power to interfere, in cases of visitation, where there are no visitors, was clearly settled in the *King* v. *Gregory*, where Lord Mansfield stated, that it had been alleged that the power of the king escheats to the king in chancery, as a charity—but that the foundation [of a college] is not a charity, and the power of superintending it does not go to the king as visitor; but it is a corporation, and, as such, the right devolves to the king to be exercised here. The case of *Manchester college* is very strong to this point; for

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for there, as long as the suspension of the visitatorial power lasted, it was the same as if there had been no visitor, and the king proceeded upon it in K. B. The statute 2 Geo. II. c. 29. is here very material: for as that court did not exercise the ordinary visitatorial power, that act made the king visitor of Manchester college; but if any question concerning the election and interest arose, the act fixed the decision of it in the court of K. B. This being clear as to the right of the court of K. B. to interfere, how is this mode to be applied? The change of the judge does not change the test by which it must be determined, which is by the statutes of the college.

As to the mode by information, the objection to it is strong, that no such information can be filed there under the stat. 9 Ann, and that all other informations ought to be filed by the attorney-general. But those informations did exist before the stat. of Ann. Every college is a corporation in itself; and altogether they form one corporation in the university in gross. There is a case in *Rusbworth*, where it is said, that the visitor of the university at large is the Archbishop of Canterbury. Yet if a person shew a grievance which wants to be remedied, the court of K. B. will find a remedy.

Hist. Coll. A. D. 1636. fo. 324. ante. 397. Rex. v. Gregory. 4 T. Rep. 241.

In the case of the *King* v. *St. Catherine's Hall*, where a similar question was started on an application to the court of K. B. for a mandamus to declare a fellowship vacant, and proceed to a new election, it was admitted that where the king was visitor in right of a royal foundation, or by special designation, the power was to be exercised through the medium of his chancellor, and not by the court of K. B.; and that, where there was any visitor, the court would not interfere in matters of visitatorial appeal: but it was contended that none of the authorities cited in support of those positions affected this

4 T. Rep. 233. 1791.

this case, *where, in default of heirs of the founder, there was no visitor.*

On the contrary, it had been solemnly determined, that where there is no visitor, or the visitatorial power is suspended, the remedy is by application to that court for a mandamus. It was not pretended that the visitatorial power comes to the crown, in default of heirs of the founder by *escheat.* The right of visitation arises from the endowment of the foundation, in order to superintend the proper application of the founder's bounty. The term *escheat* is applicable only to tenure: so long, therefore, as the land remains to the original purposes, the visitatorial power which arises in respect thereof cannot be said to escheat.—In order to maintain a colour of argument for contending that this right vests personally in the king, in default of the founder's heirs, the other side are driven to have recourse to the term *devolution*; which is taken from the civil law, and is a source of acquiring rights or property unknown to our laws. The argument, if it has any foundation, must go the whole length of shewing that there must of necessity be a special visitor of every institution of this nature; in which case it would necessarily follow that the court of K. B. have done wrong in every such instance where they have interfered by *mandamus.*

For the same answer might have been given to every application, on the defect of visitatorial jurisdiction: That where no other special visitor was empowered to act, the visitatorial power devolves on the king personally, to be exercised through the medium of his great seal. Such a notion of visitatorial power is entirely new, and inconsistent with its origin, which arises from the private act of the founder himself, and subject to be moulded by him in whatever manner he pleases;

pleases;—which could not be, if it were a mere creature of law. Whereas the power of the K. B. to interfere in such cases where there is no visitor, or his power is suspended, has been long established, and arises from the general superintendant authority which it exercises over all corporations where other jurisdictions are deficient, to prevent a failure of justice. And no greater difficulties are likely to arise in these than in any other species of lay corporations, which are alike governed by the general law of the land and their own peculiar charters or statutes. The only ground of application can be to enforce the observance of their institutions, which this court are just as well competent to do as any other tribunal.

With respect to the argument drawn from the exercise in fact of the visitatorial power by the king, that is easily explained. It is notorious, from the history of the reign of Edward VI. and from the commissions themselves, that they were not issued upon the foot of the king's general visitatorial power in the sense contended for, but were derived from his newly acquired spiritual jurisdiction upon the ruins of the papal authority in this kingdom. Neither was it a commission of visitation to any particular college, but to the universities at large, both of Oxford and Cambridge. *Non constat* that the heirs of the founder were extinct at that time; at all events the visitation did not proceed on that ground. Neither were the proceedings under those commissions of a visitatorial nature. The parties were not summoned or heard, nor was there any adjudication upon the supposed abuses which they corrected.—And the same answer applies to the statute 25 Hen. VIII.

Burnet's Hist. Reform. 15 Rym. Fœd. 178, 183.

The power of visiting thereby conferred on the king was of an ecclesiastical nature, the same as had been claimed

claimed by the pope before that time, as head of the church. And in those times these eleemosynary bodies were considered as ecclesiastical, though now that idea is exploded. On the other hand, the letters-missive of Cha. II. were pure acts of arbitrary dispensation, and certainly could not be supported at this day, though the king still takes upon him in the university of Cambridge to issue letters mandatory for the conferring of degrees. Neither do those letters purport to be visitatorial acts, but are expressed to flow from his *royal* dispensation; a prerogative claimed and exercised, in those times, in other instances than these. But at all events, if the question depended upon this consideration, whether the king were in fact visitor or not, the court would send it down to a jury to be tried.

Lord Kenyon, (chief-justice) in delivering the judgment of the court in the same case, said, That the right claimed cannot be said to *escheat:* it is misapplying the word; for that appertains to estates held by tenure, and where, on failure of heirs of the donee, the estate reverts to the donor, as an escheat. But there are several kinds of property which belong to the king, when there is no other person to take them; as in the instance of all goods, of which no owner is to be found. Then there is nothing incongruous to the general principles of the law, to say that this power now contended for, which at the time when the charity was founded was vested in some body, should now devolve on the king, there being no other person who has any claim to it, to be exercised *cy pres* to the manner in which it was exercised by the founder and his heirs. This power, though not expressly reserved to the king by the founder, yet belongs to him by operation of law. The great authority against this opinion, and which weighed most, was

what

what was said by Lord Mansfield, in the *King* v. *Gregory*. But of that it is sufficient to say, that it was not the point in judgment before the court; his attention was not immediately called to it: and Lord Kenyon said, he did not believe it was an opinion by which he would wish to be bound: it being at the most an *obiter dictum*, the court did not lay so much stress on it as they should otherwise have done, as it came from so high and respectable authority.

The other authority cited on the same side was the case of *Manchester college*, and the act of parliament which was passed in consequence of that determination. But that statute weighed the other way. It was contended by the counsel in support of the rule, that the last clause of that act was at variance with the first, and abridged the construction of it. The first clause in that statute enacts, That when it shall happen that the wardenship of Manchester shall be held *in commendam* with the bishopric of *Chester*, the power of visiting Manchester college shall be vested in the crown; and it enables the king to visit it, according to the charter of foundation: that power of visitation then must be exercised by the king in his court of Chancery. If that clause had stood alone, it would not assist the argument in support of the rule; because it must be supposed that the legislature intended, in that case, to follow the course of the common law as nearly as possible: and under that act the king cannot exercise his visitatorial power in the court of K. B.

Then it was argued, that the last clause controls the operation of the former; because it provides, that disputes concerning the election of the members of the college shall be determinable by the course of the common law, as if there were no visitatorial power in being.

being. But that clause does not say that, *in future time*, such shall be the law: it merely respects the case of the *then existing members*; leaving the power of visiting in other cases in the chancellor, and cautiously avoiding to stir the question relative to the propriety of granting the *mandamus* which gave rise to the act.

These two authorities, which were urged in favour of the mandamus, being satisfactorily answered, the only points left for consideration were, the convenience of the case, and the general law on the subject.—In general, corporate bodies, which respect the public police of the country, and the administration of justice, are better regulated under the superintendance of the court of King's Bench than of the court of Chancery; but it is otherwise with the eleemosynary foundations in general.—What is said by Lord *Holt*, in 12 *Mod.* seems decisive of this question: for though it is only called his private opinion, yet, as it was formed by him on a subject which he had so thoroughly considered, and as the general convenience of the case coincides with it, it is entitled to the best consideration. Therefore, with no decided authority or general principle of the law against them, but with the convenience of the case and general principles of law in their favour, the court held that they should do more substantial justice to the parties in this particular case, and to the public in general, by refusing to grant this writ of mandamus, and by referring this question to the lord-chancellor, than by entertaining jurisdiction over it. The rule was discharged.

Rex v. Bp of Ely. 1793. 5 T. Rep. 475. 2 T. Rep. 346.

Thus, likewise, in the case of *Wm. Frend*, who applied for a *mandamus* to compel the visitor of *Jesus College*, Cambridge, to hear and determine his appeal against a sentence of expulsion, it was held by the whole court, as settled in the case of *Phillips* and *Bury*, that the court of

of King's Bench has no other power than that of putting the visitatorial power into motion, but that if the judgment of the visitor be ever so erroneous, they cannot interfere in order to correct it. Their interference would be to control his judgment, which would be attended with the most mischievous consequences, since they must then decide on the statutes of the college, of which they are ignorant, and the construction of which has been confided to another forum. The court can compel him to exercise his visitatorial power, but has no authority to compel him to form a particular judgment on the merits. Parol evidence is not the usual way of hearing these appeals. If the visitor does not exercise it rightly, the court has no power to say how he should have decided.

The application for a *mandamus* was renewed in the following year, when the same doctrine was maintained on a more solemn and full discussion; and it was said by Grose, J. that the granting of such a mandamus is not of course: nor is it of course to grant it in a doubtful case, where the court below, assuming it to be a court of competent jurisdiction, has exercised that jurisdiction, and proceeded to sentence; and where the party has appealed against that sentence, and it has been affirmed on such appeal. 6 T. Rep. 89. 1794. Ibid. 110.

The principal ground for granting a *mandamus*, so frequently mentioned by *Lord Mansfield*, is, where it is to prevent a failure of justice, and where there is no other specific remedy; that chiefly applies to cases where there is no jurisdiction to appeal to, or where the judgment pronounced is clearly an excess of the jurisdiction of the court below.

Free chapels and donatives, except such as receive the augmentation of Queen Anne's bounty, are exempt from the

the visitation of the ordinary; the first being visitable only by commission from the king, and the second by commission from the donor: and such churches and chapels also as by 25 Hen. VIII. c. 21. being formerly in the visitation of the pope, are now vested in the crown.

2 P. Wms. 284. Governors of a charity, though not guilty of corruption, yet if extremely negligent in any case, will be liable to costs, on any application to the court.

1 Bro. Cha. Rep. 430. If trustees are directed to be inhabitants of a parish, and trustees be chosen from another parish; before the court will order them to be removed, it must be shewn that there were proper persons in the parish to be trustees.

Trustees are bound to do the best they can for the charity which they engage to serve; it was adjudged a misemployment, where they did not lease certain tythes left for charitable purposes to their full value; they were ordered to pay the difference, and the lease declared void,

Duke, 56, 58. and a new one directed.

It will be accounted a misemployment of a gift, in all cases where there is found any breach of trust, falsity, non-employment, concealment, misgovernment, or conversion of the lands, rents, goods, money, &c. bestowed, against the intent or meaning of the donor or founder; as to cut down and sell timber; to grant leases at an under rent; to retain monies, rents, and profits in a receiver's hands; to convert or change the employment thereof to other uses than those directed by the giver or founded; extravagant management and waste in the house, &c. &c. But where the gift is general, as is commonly the case, in the words "towards carrying on "the charitable designs of the institution named," there it is no misemployment to dispose of the gift in any manner the governors think proper, within the general concerns, and for the benefit thereof; for this includes their discretion,

discretion, to employ it in the best way they can, for the supply of those necessaries which either the house or the poor require, in payment of salaries, and the like: but if the donor specify any one of these particulars, it must be so strictly employed.

And perhaps, if visitations were oftener held, to examine into the conduct and management of these institutions, as well as any infractions of the statutes given by the founder; the public support and encouragement might be better deserved, and more liberally bestowed.

The school at *Bolton* was established by a private act of parliament, which provided, that if the trustees should find any of the trusts impracticable or inconvenient, they might apply by petition to the Lord-chancellor, to whom the act gave powers of variation. 2 Br. 662. 1789.

An application, arising from inconvenience in the number of trustees, was made to reduce them; but Lord Thurlow thought this not within his jurisdiction, which did not comprise a power to alter the general constitution of the trust itself, and that the application must be to parliament.

Thus the corporations in London, which have power to make bye-laws, cannot diminish the number of their courts of assistants.

The established rule is, that the legatees of charity legacies cannot, in any respect, by any agreement amongst themselves, alter or divert the charities given, they must be fulfilled according to the letter of the donor's will or intention, expressed or implied; and this principle prevails in respect to any lectureship in any college; it must be precisely such as the founder has directed: they can only improve it. 1 Vern. 42. Man v. Bullet. 1682. 1 Vern. 55. 2 Vern. 410.

A corporation for a charity, as the governors of Christ's hospital are for Hetherington's charity for the blind, and 2 Vern. 210. Lydial v. Poach. 1700.

the painters' company for Stock's charity for blind persons, are merely trustees, and cannot do any thing to prejudice it, or in breach of the rules of the foundation-deed or will.

2 Atk. 164. 1 Ves. 472. If the governors are visitors also, they are accountable to the Court of Chancery, as far as relates to the affairs and estates of the charity.

13 Ves. jun. 519. Atty. v. Dixie, 1807. Bosworth School. In consequence of abuses of an old established charity, misapplication of the revenues of the appropriated estates, leases underlet, and reservations made therein, not for the charity but for the benefit of individuals, besides the appointment by the heir of the founder of very improper persons to take the government, the question was, who had the jurisdiction to examine and restore the charity. The statute of charitable uses, 43 Eliz. c. 4. did not extend to any charity over which the founder had appointed visitors; but if the governor or visitor by his conduct involves himself in another character, his conduct in that new character may be the subject of inquiry in the court of Chancery, as if he placed himself in the situation of an ordinary trustee, taking upon himself to receive rents and profits, &c. otherwise the abuse must be without redress.

Sutton Colefield. Duke, 68. Birmingham School. 2 P. W. 325.

But here the will vested this power in the heir to visit through the intervention of the court, and the court had interfered on a former application, when the skinners' company had declined the visitation.

It was stated by the defendants, that all the proper parties were not before the court; no person living who had any memory of the transactions upon which the charges of fraud were founded. The will did not appoint a visitor, but merely a reference to the jurisdiction of the court.

1801. Lord Eldon said, the authority, according to the will

will given to the court, is a special authority applying to a particular case. The particular provision in the will having failed by the refusal of the skinners' company to act, it naturally and legally devolved upon the heir at-law. The crown, as it always does, took the heir's recommendation of the governors of the school. In his character of manager of the revenues unquestionably he became amenable to this court; for in his character of visitor he never could control his own accounts. If the company do not nominate governors, or if their nomination cannot be considered a nomination, *de jure*, by implication, the nomination is given to the heir at-law; and as to the schoolmaster, to the *Bishop of Lincoln*.

The first letting was undue, the tenant being himself a governor. But there is a great difference between an undue letting and a lease for the purpose of constituting himself tenant, that he may have the means of underletting at a great private advantage. The leases were undue also in this respect, that the chances of improvement in a lapse of time are to be taken, and are not to be prevented by leases enduring half a century; one lease was granted to *Dudley* by governors not duly appointed for 99 years, upon the lives of three daughters of the heir-at-law, at a rent of 3l. less than he paid before, and a fine of 150l. with a declaration of trust indorsed upon it by Dudley.

As to the difficulty of the account, by reason of their length, the court for the present confined its enquiry to the rents under this lease; and if the result should be, that any part had been applied in the family that ought to have gone to the sustentation of the school, the estate of the heir-at-law will be answerable for the account. And an account was also directed of a period, during which the heir-at-law had been a lunatic, which pro-

duced the question as to jurisdiction. It does not necessarily follow, because a commission of charitable uses would not issue, that therefore this court could not act; and if it were made out that the governors were merely optional, and only the agents of Dixie the heir, this court would try to get at it. But here was no visitor capable of acting, a person as committee of the lunatic is acting without authority for him as visitor; and till after the information filed there were not even nominal governors. Then, if the information was well filed, will the election pending the suit take away from the court the jurisdiction, even if they were well elected? I think not; for the governors, if well elected, are trustees; and the visitor not being capable of acting, the jurisdiction of this court must take place.

As to the letting, no trustee can be a tenant, and the court will charge him with an occupier's rack-rent, and he must quit the premises. As to the other governors, men are not to put themselves in a situation of responsible duty, and expect to be relieved even at the expence of those who bring them into that situation: therefore it would not be unwholesome to serve them with the decree. As to removing the governors, it was very difficult to say they were not to be removed; such an election of governors, compared with the duties required by the statute, the only answer could be, that no other governor could be obtained: but the evidence was against that. The consequences of removing them was reserved till after hearing the petition for their removal and nomination. Dixie had no right to apply the surplus rents pending the suit.

The petition was accordingly presented in 1802, which embraced the subjects of visitatorial authority, of appointment of governors, and of the application of the surplus

surplus rents. The court thought it best to confine the general account, to be taken from the time of filing the bill, that the appointments of the master had been very irregular, and were declared invalid, with liberty to make any application for a due appointment to those persons who could make it. As to the governors, the founder originally intended to reserve to his family a considerable influence, and that purpose was very proper in a moral view; but the conduct of the defendant had been such, that his lordship did not know how to preserve that influence in his person, and if not, he did not know how it could be preserved in any degree. The election of governors was a wrong and undue proceeding, as under the circumstances that election should not have been made pending the cause without leave of the court. The situation in which some of the persons electing stood, called for strong animadversion. Those governors were removed, the court having the jurisdiction. This was not the mere case of a corporation having visitors; but the visitor himself has generally been one of the governors, and the governors were acting as trustees in the receipt of the rents and profits of the estate. That is a sufficient ground; but there is another ground, that the interest which this family have had with the rector has not induced him so far to accede to their purposes as to keep the corporation alive. From the period of the dispute about the management, it did not appear to have existed as a corporation until the governors were filled up under those circumstances. Then it is the case of persons, acting as to what did not belong to them within that corporate character, that would be necessary to lay the foundation of an objection to the jurisdiction. The corporation revived, therefore, could not possibly compel a due account for the time past, or a due appli-

cation for that period, without the assistance of a court of equity, which therefore must have jurisdiction as to those persons who acted in the intermediate period; not having vested in them that character, which alone could form the ground for an objection to the jurisdiction. Inquiries were directed as to those leases, which Dixie procured for the benefit of some of his family, and his assets deemed liable, at least to the extent of what the charity had lost, by the benefit they received.

A general account would be difficult and expensive, and it was not clear that the expence of it would fall upon his estate; and therefore it was doubtful, whether it would be beneficial to the charity, if the expence of an account to so remote a period should be defrayed by the charity funds. As to the period of the lunacy the management was short; as to the committee not saying, whether it would be right to disturb the payments to the schoolmasters and others, without a very strong ground, it was adjudged to be due to principle and authority to declare, that the information must carry with it an account, at least from the time when it was filed. The appointments were declared invalid; one was a culpable abuse of the trust, by a bargain for a division of profit; and the defendant had imposed a duty upon the other, not only to this school, but also to his brother, to preserve by proper conduct that influence, which the founder had intended to give to his family. The relators were ordered to bring in proposals for proper persons to be governors; and if, upon inquiry, the master was not duly appointed, proposals for such appointment, and to state in whom that right was vested, and a scheme for future management of the charity should also be brought in.

11 Ves. jun. 191. Atty. v. Black, 1805. Where the foundation-deed vested the right of appointing a schoolmaster in persons whose heirs could not be

be found, and in their default in the curate, churchwardens, and six of the chief inhabitants of the parish, for the time being, concerning the latter of which disputes had arisen, it was suggested by petition to the lord-chancellor, that the right vested in the crown, to be exercised by his lordship as having the whole visitatorial power. But his lordship doubted whether, as visitor, he had the right of appointing; the patronage did not follow the visitatorial authority. The master had a freehold in his office; the patronage was vested in the curate, churchwardens, and six of the chief inhabitants; it was in their gift, not in the gift of the visitor; and the fact of their having made two elections, which became void, does not vest the power in the visitor.

Wherefore, as visitor in right of the crown, those elections were declared void, the rents to be paid to the gentleman who had done the duty, and until another should be properly chosen; and it was referred to the *Attorney-general*, to consider and report what directions and alterations, touching the mode and right of election and appointment, might be proper, and what might be made in the constitutions of the school most conducive to the interest and benefit of the objects of the charity, and the furtherance of the donor's intention; but that it ought to appear to be the report of the attorney himself, and not of any one whom he should appoint.

The nomination of a master to an hospital or school is not grantable in reversion, nor is it like the presentation to a living; and in the case of a rectory, impropriate originally in a monastery, but afterwards devised to a parish, the trustees have the nomination, and must present a rector.

1 Ca. Cha. 214. Atkins v Montague.
1 Vez. 80. Atty. v. Wycliffe.
5 Atk. 576.
1 Vez. 4[illegible]. S.C. Atty v. Parker.

A power given by the founder to the ordinary, to decide any difference between the officers in making up their

5 East. 221. 1807.

accounts, and to appoint a master in case of lapse, to correct or amove, to sequester his profits in case of removal of money from the public chest, and also to interpret the statutes, are all powers which do not constitute a visitor, or in exclusion of the authority of 43 Eliz. c. 4. and a commission of inquiry is necessary.

By an order of the Lord-chancellor, made upon a motion to quash a commission of charitable uses, as having improperly issued in a case not warranted by the statute, the following case was stated for the opinion of this court. By letters-patent, under the great seal in the 2d and 3d Philip and Mary, license was given to Dr. *John Dakyn*, rector of *Kirby-Ravensworth* parish, in the county of York, to found in that parish a school or alms-house, or hospital, for the education of boys, and for the relief of the poor; to consist of two wardens and one master of the scholars, and certain other poor persons, according to the statutes, ordinances, and foundations to be made by the said John Dakyn, his heirs or assigns. It was also granted, that Dr. Dakyn, his heirs, executors, or assigns, or any of them, should from time to time make ordinances, statutes, and rules for the government of the said scholars and wardens, boys, and inferior people of the hospital; and that the two wardens, and master, and their successors should be a corporation, and have perpetual succession, by the name of "Wardens, teacher, or master of the scholars and poor people of the alms-house or hospital of St. John the Baptist, of Kirby Ravensworth," and should be capable of taking lands, &c.

Dr. Dakyn, by virtue of this license, in 1556, established the school or hospital, and endowed it with lands, &c. and also made rules, ordinances, and statutes, for the government of the charity, dated 11th May, 1556; whereby, after appointing a mode of electing the wardens triennially,

triennally, by ballot, at a meeting of the rector, vicar, or curate of Kirby-Ravensworth, and specifying the duties of the wardens; it is provided by cap. 5. that both the wardens, after their account of their receipts and expences, according to the form prescribed in their oath (at the giving in of which accounts no parishioner of Kirby-Ravensworth is to be excluded), shall receive 10s. for each year of their office, by the hands of the new wardens, besides their necessary expences. But if in making up the accounts any doubt, or any other thing hurtful to the said alms-houses or hospital, shall arise, which cannot be decided and ended by the care and discretion of the two wardens, rector, vicar, or curate, and school-master, then the new wardens shall, within 40 days next ensuing, lay this matter *before the ordinary of the place*, and shall take care that the old wardens shall answer before the said ordinary concerning their doings, *juxta formulam ecclesiæ quia contingit de religione domi*. By cap. 6. after appointing the election of a schoolmaster, by the two wardens, and the rector, vicar, or curate, and two church-wardens of the parish, or the major part of them, it is provided that if they neglect to substitute a master within 60 days after the death, privation, or promotion of the former master, then the substitution of the said master (if made within 30 days after notice to them) shall pertain to the *Dean and Chapter of York*; and if they omit, &c. the appointment, for that turn only shall devolve to the *Bishop of Chester*; or if the see be vacant, to the dean and chapter. By cap. 11. if the master be addicted to gaming or drinking, or be disgraced, or defamed by any other crime that shall stand in need of ecclesiastical correction, this shall be punished *by the ordinary of the place*, according to the rules of canons of the ecclesiastical law; by whom also,

also, if the crime require it, he shall be removed from his office. By cap. 31. after ordaining that 5l. for the use of the alms-house be constantly kept in a chest in the parish church, and lent only upon good security for repayment within six months, it is provided, that if the money be taken out by rapine, &c. the wardens and schoolmaster shall so long be deprived of their salaries *by the ordinary of the place*, till the money be restored: and in such a case there shall be a power *in the ordinary* to sequester the profits, and make inquiry concerning the premises when he pleases. Cap. 35. Also, I will, ordain, and appoint, that if any doubt shall arise concerning the meaning of the statutes already published, or shall hereafter be set forth by me, or any thereto lawfully authorised; that doubt, of whatsoever nature, shall be interpreted, altered, or made new, by me *John Dakyn*, if I please to have it so, while I live: but if any doubt shall happen when I am dead, I will that it be determined and *interpreted by the ordinary of the place*, with as much regard to the grammatical sense as may be. Cap. 36. Also, if it should happen at any time hereafter that the wardens, schoolmaster, or poor people of the alms-house or hospital, or any of them, shall sell, mortgage, or any other way alienate, any of the lands, &c. pertaining to it, otherwise than by leasing the same for years, for the value of the wonted rent at least, or shall permit any of the lands, or other premises, to be unjustly usurped, &c. and shall not resist the usurpers, &c. to the utmost of their power; and if after such an attempt, the master, wardens, and poor people do not bring an action at law against the usurpers within half a year, and effectually prosecute it, in such a case I will, ordain, and appoint that the *Dean and Chapter of York* shall have power and authority to expel and remove, as they like, the two wardens

wardens and schoolmaster, or any of them, alienating, or consenting to the alienation of the premises, &c. and to appoint others, &c. who will claim and regain the lands usurped, &c. and apply and restore the same to the said alms-house or hospital, and reform the neglects, &c. and preserve the said alms-house or hospital in its primitive state and condition, as much as in their power, answerable to the statutes and ordinances of me *John Dakyn*, and of all and every the benefactors of this alms-house. And I further ordain, that the said dean and chapter shall have 30s. yearly for their concern of the premises, viz. 10s. out of the stipend of the two wardens, and 20s. out of the master's salary, until the alms-house or hospital be restored to its pristine state and condition: to cease when this shall be effected, &c. The statutes also contain various directions respecting the schoolmaster, his election, stipend, and oath; particularly his duties, and for what causes he may be, *ipso facto*, deprived of his office, and another elected in his stead: also directions respecting the appointment of the usher, his duty, salary, and office; the punishment and exercises of the scholars: the election of the poor people, their oath, behaviour, salary, lodging, duties, and removal: also concerning the land, rents, revenues, property, and accounts of the corporation, and of the repairs of their school-houses, chambers, and buildings.

The case also referred to the statutes themselves, if necessary. The question was, Whether there were a visitor, governor, or overseer, or visitors, &c. of the said hospital, appointed within the meaning of the statute 43 Eliz. c. 4. for redressing the misemployment of lands, &c. given to charitable uses?

It was argued against the commission, that a power is given to the ordinary of the place, the Bishop of Chester, to

to interpret the statutes; which confers a general visitatorial authority: and it is no derogation of this authority that an ultimate appeal lies to the same person, in case of any doubt in making up the accounts of the old wardens; or that he has the ultimate appointment of the schoolmaster, if the wardens, &c. neglect to fill up the vacancy within 60 days, in the first instance, and the Dean and Chapter of York within 30 days after notice, in the second instance; or that to him is before expressly given the correction and deprivation of the master for sufficient cause; and the sequestration of the profits of the wardens and schoolmaster, until the money improperly subtracted from the chest be restored. The dean and chapter of York have indeed a special power delegated to them to remove the wardens and schoolmaster consenting to a mortgage or alienation of any of the estates of the charity: but there is nothing inconsistent in the appointment of a special visitor for a special purpose; while for general purposes a general visitor is appointed. The power of interpreting the statutes of the foundation, without appeal or control, is the most general visitatorial power which can be delegated. No technical form of words is necessary to appoint a visitor: it is sufficient if such be collected to have been the intention of the founder. *Atty.-gen.* v. *Talbot*, and *St. John's College* v. *Todington*.

2 Atk. 622—7.
1 Burr. 158, 201.
3 Bac. 71 to 90.

On the other side it was urged, That no general visitor is appointed within the meaning of the statute of Eliz. but the ordinary has only a special authority delegated to him in particular cases, as the dean and chapter have in others. There is no case where a power of interpreting the statutes of the founder has alone been deemed to constitute the interpreter a general visitor.

In the case of the *Attorney-general* v. *Talbot*, Lord Hardwicke

Hardwicke certainly looked to other clauses than that giving the power of interpretation: he referred to another clause—"Cancellarius, &c. poterit visitare; et si quid inter eas repererit corrigendum, &c. corrigat et puniat." Next the foundress directed who should construe the statutes, viz. the chancellor, with his assistants, and she *excluded her own heirs.*

The cases therefore do not bear out the position that a power to interpret the statutes constitutes a visitor; for in both there was an express power given to visit, and to correct and punish. The statute of Eliz. looked particularly to correct abuses which had been committed in respect of lands given to charitable uses. Here there is no general power given to correct such abuses, but a special power only, which excludes the other. If the founder had meant that the ordinary should have general power over the funds, he would not have given him a special power in the instance of the 5l. improperly withdrawn from the chest. It has been holden that a general visitor may expel: but a power to interpret statutes, cannot include a power either of expulsion or appointment. And in construing the statutes of the founder, nothing is to be taken away from him or his heirs, who are the proper visitors, except by plain words or necessary implication. 43 Eliz. c. 4.

If a general visitor had been appointed, or even a general power of control given over all the lands, &c. of the charity, no commission could issue under the statute of Eliz.: but the power is only given to the dean and chapter of York, in the particular cases of mortgage or alienation by the wardens, &c. who have the immediate management: there is no provision made against abuses of a different description, or by the dean and chapter themselves.

The

The court certified to the lord-chancellor their opinion, That there is not any visitor, governor, or overseer, or visitors, governors, or overseers of the said hospital appointed, within the intent and meaning of the act of parliament made in the 43d of Eliz. c. 4. above referred to; so as to exclude the application of the powers granted by that act

The open principles upon which modern institutions of charity are established, afford to their respective governors an ample power of examining into their affairs, and of redressing any abuses of their laws, or misapplication of their revenues; and this is the chief reason that we seldom meet with any cases in the courts on such subjects but what relate to ancient establishments: the general meetings of the governors of modern charities possess an intire control over their whole economy, and over the powers they have delegated either to their committees, or to their officers: these powers they may at any time resume; and the wise precautions almost universally taken for official fidelity in the execution of the trust reposed, secures in addition to expulsion, the summary redress of pecuniary restitution for peculation.

Upon the whole, the subject of visitation may be reduced to these principles:—

That in all institutions of a public nature, for public government, founded by charter from the crown, the king is the general visitor.

That in all private institutions (the distinction has already been fully explained) the founder and his heirs, or the person whom he or they shall appoint, is visitor. And in default of such appointment, this visitatorial power vests in the crown.

That the visitor's power is conclusive, to redress all grievances, and decide all differences, elections, and the like,

like, on appeal, which must be made to him. That his decisions are without further appeal, but must be agreeable to the statutes of the institution, and the laws of the realm; and if otherwise, they are then examinable by the king's courts.

And that wheresoever the king is visitor, or where no visitor is appointed, all such differences are likewise cognizable by his courts at Westminster Hall.

CHAP. II.

OF LEASES, &c.

SEVERAL statutes have limited the terms for leases of hospital lands.

23 H. 8. c. 27. Dyer, 247. 19 H. 7. c. 7. The act of Hen. VIII. for leases of hospitals, colleges, and other corporations, states, that by the common laws of this realm, all assents, elections, grants, and leases made and granted by the majority of the chapter or fellows, or brethren of any cathedral church, hospital, college, or corporation, by whatsoever name incorporated, were as effectual as if the whole body assented thereto; yet divers founders had made, among their peculiar acts, local statutes, that if any one should dissent, no such lease, election, or grant should be made; to which they had been sworn, and so the residue could not proceed to the perfection thereof, without the danger of perjury; for avoiding whereof, and for the due execution of the common law universally within the realm, and every place, in one conformity of reason to be used; it is ordained, that every peculiar act or statute made by any founder, at the foundation, whereby the grant, lease, gift, or election of the governor or ruler, with the assent of the majority, having voice of assent, should be in any wise hindered by any one or more of the lesser number contrary to the common law; should be as to such statute void: and no person of any such hospital, college, or corporation, should from thenceforth be compelled to take

take an oath for the observing such order or statute, on pain to the person giving such oath, to forfeit 5l.

The statute having thus confirmed the common law, in the power which reason also ascribes to the majority of every society, in all their acts, and particularly in those of leases, elections, grants, and the like; the next act we meet with on this subject was purposely made to restrain long leases of ecclesiastical lands; yet it has always had a benign and favourable construction, and therefore has been held to include *all manner of hospitals*, be they incorporated by any name, or be they sole or aggregate. "All leases, gifts, grants, feoffments, conveyances, or estates, to be made or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, or master or guardian of any hospital, parson, vicar, &c. of any houses, lands, or tenements, being part of the possessions thereof, other than for 21 years, or three lives, from the time any such lease shall be made or granted, whereupon the accustomed yearly rent or more, shall be reserved, and payable yearly during the term, shall be utterly void." But the act does not extend to make good any university lease for more years than are limited by the private statutes of any college. Nor to any new lease made on the surrender of a former lease, or by reason of any covenant or condition contained in any lease then continuing; so that the new lease do not contain more years than the residue of the former, then continuing, shall be, at the making of such new lease, nor at a less rent.

13 Eliz. c. 10. Watson's Com. Incumb. c. 41. 11 Co. 76. a.

Limited to 21 years, or 3 lives.

But a subsequent statute which continues the above, declares, that this shall not extend to any grant, assurance, or lease of houses belonging to any such college, hospital, or corporation, which houses are situate in any city, or town, or suburbs, but that the same should be granted as

Continued by 16 C. 1. c. 4. 14 Eliz. c. 11. sec. 17. 2 Leon. 188. 1 Roll. 161.

thentofore, according to the common law or statutes of such institution; so that such house be not the capital or dwelling-house, used for the habitation of the persons abovesaid, nor have ground thereto belonging above ten acres:—Proviso, that no lease shall be made by force of this statute in reversion, nor without reserving the accustomed yearly rent at the least nor without charging the lessee with the reparations, nor for longer term than forty years at the most; nor any houses shall be permitted to be aliened, unless in recompense thereof there shall be afore, with, or presently after such alienation, good, lawful, and sufficient assurance made in fee-simple, absolutely, to such colleges, *houses*, bodies politic or corporate, and their successors, of lands of as good value, and of as great yearly value at least, as so shall be aliened.

14 Eliz. c. 12. 3 Co. 61. Hunt v. Singleton. Cro. El. 564.

Continued by 39 Eliz. c 18. sec. 13, 41. 18 Car. 1. c. 4. Gibs. 737.

If a corporation aggregate make a lease not warranted by this statute, it is void against themselves.

Five years had scarcely elapsed since the last act, before it was found necessary for parliament to intercept a practice which began very generally to prevail, of granting further leases of ecclesiastical lands, before the current leases had expired, which defeated the true meaning and intent of the last statute: wherefore, by another act in the year 1576, all such new leases made within three years of the period of the current lease, and all bonds and covenants for any such renewal, were declared void.

18 Eliz c. 11. Moor, 769. Godb. 29.

Goodtitle v. Funucan. Doug. 552. 1781. 1 Anders. 65.

Lord Mansfield, speaking of this statute, said, the words of the 13th Eliz. c. 10. strongly require ecclesiastical leases to be in possession, and not in reversion; yet all the judges held, in *Fox* v. *Collyer*, that an immediate lease for 21 years, of premises on which there was a subsisting lease for four years, was good. The 18th Eliz. c. 11. restrained the right to make such concurrent leases

leases to cases where the old lease had not more than three years to run. It is apparent, from statutes of 32 Hen. VIII. c. 28. and 13 Eliz. c. 10. that the legislature meant to confine the authority to let, to lands which had been formerly letten, and were capable of producing profit; this is the true construction, if not from express words used, yet by necessary implication.

But a doctrine was afterwards established, which in some respects tended to avoid this statute, where, upon a new lease pending the former lease, the same rent was reserved, this renewal was held to be a new lease; and as soon as it was accepted by the lessee, the former lease was determined; for it was held that the last contract dissolve the first, when the one and the other cannot stand together. The lessee cannot after the second lease grant over the term under the first; for if so, the second would not be good: the second term cannot be good, but by the determination of the first, which is by the lessee's acceptance, and therefore a prejudice to none but himself, and, *volenti non fit injuria*: for the first contract, which was entire, cannot be so dissolved in part, but in the whole, as to the party's interest; and therefore the first is gone in the whole: and if so, then the last lease is but as a lease to begin at a time to come; which is made good by the statute of 14 Eliz. if it do not exceed the term of 40 years from the date; for the purpose of that act was, that colleges and the like shall not make grants in reversion, unless it be for a year; and the reason was, because that by such grants in reversion they shall be excluded from their rent of the particular tenants for the time: and upon this reasoning, which established the tenancy to commence at the date of the second lease, the court of K. B. maintained two leases of the same land, granted by Magdalen college, Oxford, for 20 years each, to different

Poph. 9. Thomson v. Trafford. 35 Eliz.

ferent tenants, at the same rent; the latter being made seven years after the first, to commence at the expiration of the first, so that both terms together did not exceed the 40 years limited by the statute.

Co. L. 5. 11. Ives Case. Hutton, 105.

It was afterwards adjudged, that the acceptance of a lease for years, to commence at a future day, is a present surrender of a former lease: but this rule is subject to much consideration of the circumstances which may attend the mode of surrender, the title under which the two leases are granted, and the capability particularly of the lessor.

Wilson v. Sewell. 7 Geo. 3. B.R. 4 Burr. 1980.

For, the acceptance of a new lease, if it be a good one, is a surrender of the old one; but if it be not a good lease, it is not a surrender of the old one, and the first is not avoided: for it is not reasonable in itself, nor can it be the intent of the parties, that an acceptance of a bad lease should be an implied surrender of a good one; this is not only agreeable to principles and common sense, but has been determined in *Lloyd* v. *Gregory*.—See also *Watts* v. *Maydwell*, &c.

Jones, 405. Hut. 105.

Likewise, if a surrender is intended for a particular purpose, and that purpose, the only motive of it, fails, the surrender ought, in like manner, to fail: also, the second lease must pass an interest, or it cannot be considered as a lease; it does not operate as an estoppel—the acquiescence of the lessee only operates by way of estoppel; the lessee would, in an action for rent, be estopped to say, that the second lease is void—for an estoppel presumes the lease to be good. Where the first could be of no use, if he had had the second, and both parties so *intended*, there is no inconsistency in the acceptance of a new good lease being a surrender of the former: but the accepting a new void lease, which the lessee is not to enjoy, could not shew an intention to surrender

Bromley v. Stanley. 4 Burr. 2212.

Co. Lit. 47 b. 352.

Lit. sec. 667.

surrender the other: therefore, the reason why this should be an implied surrender, totally fails: a void contract for a thing that a man cannot enjoy, cannot in common sense and reason imply an agreement to give up a former contract.

Assuredly the acceptance of a second lease is an implied surrender of a former lease, but it is nothing more; the mere fact of cancelling the former, and reciting a surrender in the new lease, does not comply with the language and intention of the statute of frauds, the words of which are, "no lease of any lands or houses shall be "surrendered, unless by deed or note in writing, signed "by the party or his agent, thereunto lawfully authorised "by writing, or by act and operation of law." The act of cancellation, which can in no allowable sense of the words be considered as either "a deed or a note in writing," cannot since that statute be a surrender; nor can the counter-part of the second lease enure as such, unless it does so by operation of law, inasmuch as it does not purport in its terms to be of itself a surrender, having no words in it which denote, or can amount to a yielding or rendering up of the interest; but merely recites that the grant of the new lease is partly in consideration of the surrender of the first indenture; and which fact of previous surrender this recital by no means necessarily imports; for the statement in the counter-part will be sufficiently accurate, if the acceptance of the second lease would, by operation of law, be a surrender of the former.

Roe ex dem. Berkeley v. Abp. York, 1805. 6 East. 102, and seq.

It has been said, that if the second be a good and valid lease in all respects, its acceptance may work a surrender of the first, inasmuch as two leases cannot stand together; and it has been laid down by Lord Coke, as to ecclesiastical leases, that though not warranted by the

Co. Lit. 45.

1st and 13th Eliz. they are good against the lessor, if a sole corporation, and during the life of the head, if made by an aggregate one; the acceptance of a *voidable* lease is a surrender, though the acceptance of a *void* lease is not; but it must be remembered, that the case alluded to by Lord Coke, is that of a lease, which, but for the disabling statutes, would be good for the whole period contained in it, and which could only take effect in one way, namely, out of the estate of the lessor; and that the question there did not properly turn on the effect of the instrument, but on the construction of the disabling statutes, i. e. whether they made it void *ab initio*, or only void as against the successor; leaving the lease to have the effect and operation it had prior to the statutes, for so long time as it did not prejudice the rights which those statutes were made to protect.

Dyer, 140—6 Whitley v. Gough.

One of the first rules for the construction of deeds, is *verba intentioni, et non e contra, debent inservire.* This rule was recognised in *Gibson* v. *Searle*, in the case of a surrender, where the court resolved unanimously that it was not a surrender, for that ought to be the intent of the parties; and it appears that there was not any intent of the parties: the lease was made with intendment to his benefit, and not to his hindrance, as it should be if it should be construed a surrender, &c. See also *Goodtitle* v. *Bailey*, and *Samon* v. *Jones*.

Shep. Touch. 86.
Cro. Ja. 176.
Cowp. 600.
2 Vent 318.
Willes, 687.

To settle all doubts relative to the power of corporate bodies granting leases of tythes, or incorporeal hereditaments, and remedy for rent in arrear; the act which passed in 1765, declares all leases thereof made for one, two, or three lives*, or for 21 years, as good in law as those

5 Geo. 3. c. 17.

* A *cestui que vie* is a mere pillar to uphold the estate of a tenant, and as he has no such a seisin as to give to the lord a heriot on his death, so neither

3 East. 266. 1803.

those granted under 22 Hen. VIII. c. 9. and gives power to sue by action of debt for all rent in arrear; reserving the terms of such leases to the restrictions of their own local statutes.

This action of debt against the lessee is given to secure the corporation, under any lease of tythes or other incorporeal hereditament, which was well calculated for the benefit of ecclesiastical preferments, because there was no place wherein any distress could be taken; but it has been already said that the expression of "Master and Guardian "of Hospitals," which are also found in all these acts, include all manner of hospitals, and therefore it is here mentioned, for their benefit likewise. 11 Co. 76. a.

It is also held, that the old lease may be surrendered, though there are under-tenants in occupation: and to obviate the difficulty of surrendering up all the under leases, the surrender of the original is made equally valid, and a new one may be granted thereon. 4 Geo. 2. c. 28. s. 6.

The acts recited, certainly restrain any corporation from wholly *alienating* any of their lands or tenements; for not only the word *lease* is mentioned, but also all *gifts, grants, feoffments, conveyances,* or *estates,* are restricted to three lives, or 21 years. But some institutions have since been favoured with private statutes, relieving them from these restraints, which will be mentioned hereafter. Wats. c. 42.

If a lease for years be made to a corporation, who cannot take it without deed, and they grant it over, the grantee may entitle himself thereto, without shewing the deed; because the lease of the thing in its nature might have passed without deed; although the persons who Cro. Ja. 110.

ther has he such as will enable his widow to claim her free bench; both which incidents are essential to the tenant's estate, according to the custom.—*Right v. Bawden.*

took it could not take it without deed; also his possession is some privilege for his title. But note; this decision was prior to the statute of frauds, 29 C. II. c. 3. whereby leases, except for three years, are directed to be in writing.

1 Bro. Cha. Rep. 62. 1779. Somerville v. Chapman. Bettesworth v. St. Paul's. 3 Br. pr. ca. 389.

The act of 13 Eliz. cap. 10. authorises hospitals to grant leases for three lives, but the court of Chancery will not compel them to renew leases upon certain terms, under two years reserved rent. The discretion is only, that they should not increase their fines, by taking two years' rent; but not to prevent their taking one year's rent, though it shall amount to more than formerly: for a perpetual renewal upon particular terms, would be equivalent to an alienation.

Clark's Case, 26 Eliz. 4 Leon. 11.

In preparing leases of corporations and incorporated hospitals, the utmost correctness is necessary in the description of the grantors, according to their incorporate title; all of whom should demise and covenant in their corporate name, and not the masters with the assent of the brothers and sisters, for they are all one body politic, and no one of them can be separated from the other; and in this respect are very different from joint tenants, who may, by the assent of the one, render valid the act, lease, or deed, of the other: but the corporate members of any society cannot be severed, and consent to each others act, but must all act together as one body, or as one person in law: and they are, also, different from the ancient monastic establishments, whose abbot or prior granted leases with the assent of his brethren, the monks or friars, for they were dead in law, and could not legally be parties to any lease or public act; but the brothers and sisters in modern corporations are all capable in law. Nor is this case like those of parson, patron, and ordinary, where the parson, with consent of the patron and

and ordinary, grant a rent-charge, for the parson is the principal grantor, and the others have not any express interest in the land charged. This doctrine was held by *Agliffe*, J. and *Clench*, J. against the opinion of *Gawdy*, J. the Chief-justice *Wray* being absent.

Corporations holding a lease from the crown may grant under leases, but not the whole of their interest; for though the original lease gave them a capacity to take, it does not enable them to grant the land to another. Chesterfield's Case Cro. El. 35. 368. Co. Lit. 3. Cro. Ja. 110.

Lessors or lessees holding official situations, and granting leases and covenanting therein, do not bind their executors, but successors only, for their interest is merely that of a life-estate, and besides the rent is reserved payable to their successors, in office, and not to their own representatives; their interest, therefore, ceases with their lives. Clements v. Waller. 4 Burr. 2155. 8 Geo. 3.

But it was held in K. B. in a very recent case, that the tenancy of a corporate body may be determined by notice delivered to its officers, after which the cattle of either of them feeding on the premises is a trespass, and ejectment lies for the possession against any one in the actual possession, for trespass cannot be maintained against a corporation as such. The officers or plaintiffs as such, not being themselves a distinct corporation, cannot have the possession, whatever they enjoy as such must be in right of the corporation at large; they cannot of themselves have any succession, and consequently cannot, as bailiffs, be affected by the receipts for rents given to their predecessors in office; there is no priority in law between them. Doe v. Woodman. 8 East. 230. 1807.

It may be proper here to mention some institutions which have been affected by the legislature, or by judicial determinations respecting their leases.

The letters-patent and act for the incorporation of *Sutton's* 22 June, 9 Ja. 1. 10 Co. Rep.

ton's hospital, on the scite of the ancient *Charter-house*, (instead of *Hallingbury Bouchers*, in *Essex*, according to Sutton's first intention) enabled the governors to purchase and hold lands for its maintenance for the abiding, dwelling, sustentation, and relief of such numbers of poor people and children, as Sutton during his life, or the governors after his death, should appoint. The whole establishment was freed from all visitation, except by their own appointment. They had power to receive lands and advowsons without any license of pardon for alienation of them, notwithstanding the statute of mortmain, and the livings were to be bestowed upon the scholars.

The governors were to be incorporated by the title of "The governors of the lands, possessions, revenues, and goods of the hospital of King James, founded in the charter-house, within the county of Middlesex, at the humble petition, and only costs and charges of Thomas Sutton, esq." and to have a common seal for the granting leases and other corporate acts, but no lease of the parsonage at *Hallingbury* should be made other than such as should determine when the preacher of the hospital, at the date of the lease, should die, or resign, or be removed; which provision secured that benefice to accompany the office of preacher or minister of the hospital; and that they should not make any lease, grant, conveyance, or estate, exceeding the number of 21 years, either in possession, or not above two years before the expiration of the estate in possession; and whereupon the accustomable yearly rent or more, by the greater part of five years next before the making such lease reserved, due, or payable, should not be reserved, and yearly payable during the continuance of every such lease; and that any increase of the rents or revenues should be employed

to

to the maintenance of more, and other poor people to be placed there, or to the further augmentation of the allowances of those persons who should be there; and not be converted or employed to any private use; and to the end, that all suspicion of indirect dealing might be prevented, it expressly provided, that the lands should be leased, demised, granted, or conveyed to any of the governors themselves, or to any persons for their use, although express mention of the yearly value and certainty of the premises be not made, any act or restraint to the contrary; with power to make bye-laws.

The livings upon the estate to be presented to the scholars brought up at the hospital, avoiding as much as might be the giving of more benefices than one to any one incumbent.

By deed of gift, dated 1 Nov. following, 1611, Sutton granted to 16 persons (the great officers of the realm) all the said manors, lands, advowsons, &c. in trust, to distribute the rents and revenues, for the maintenance and continuance of the hospital and free-school, and of the master, preacher, schoolmaster, usher, poor people, scholars, and officers for the time being, at all times, then, after, for ever, according to the letters-patent, subject to a yearly rent of 12d.

Thomas Sutton died at Hackney on 14th Dec. 1611, in the 79th year of his age; and immediately afterwards his nephew, and heir-at-law, Simon Baxter, brought trespass against the executor of his will, to try the validity of the incorporation, in which he failed.—See Sect. 7.

Where a debt is secured by mortgage of a college lease, which is afterwards renewed to another person, and held by him in trust for the benefit of the debtor's family, to the injury of the creditor's security, the court will

Finch 393. 1678. Lukin v. Rushworth.

will direct the debt to be satisfied out of the whole of the debtor's estate.

Hodgson v. Sharpe, 1808. 10. East. 353. See ante. 71.

The act of 15 Car. 1. c. 17. for registering leases of *Bedford Level*, was meant for the protection of titles, that leases and conveyances within that district should be registered, that every person interested in the inquiry might know in whom the title to any such land was; and therefore, as against persons who had been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection to the lease might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate.

If an hospital be dissolved either by law or by fact, any lease granted under its corporate seal becomes void. This point was settled in the case of *Pitts* v. *James*, upon the dissolution of *Aberbury's* hospital at *Donnington*, according to the statute of 1 Edw. VI. against superstitious uses; and that ground having been ably considered and explained by Lord Hobart, it may be proper to review the substance of his lordship's determination, after which it will be sufficient merely to refer to the recent case of *Atty.-general* v. *Hicks*, wherein the ground of dissolution of an ancient corporation in Cornwall was, the want of objects to fulfil the original foundation, already mentioned amongst the cases under ch. 1. sec. 10. of the doctrine of *cy pres*.

Pitts v. James. 12 Ja. 1. Hob. 121.

Sir *Richard Aberbury*, under letters-patent, 16 Rich. II. founded an hospital at his manor of *Donnington*, in *Berks*, for certain poor persons to serve God, and to pray for the souls of King Richard and himself, while they lived, and after; and for the souls of the king's progenitors and heirs, and his own ancestors and heirs for ever,

ever, according to such ordinances as he should make. He appointed one to be above the rest, and to be called *Minister Dei*, &c. They were to go daily to mass to an adjoining chapel of friars, and say fifty paternosters, and as many avemaries.

A succeeding minister and the almsmen, his brethren, granted a lease to one *Lewes*, of the manor, for 80 years, which by mesne assignments were held by *Pitts*, who granted a lease to the plaintiff, who entered upon the defendant *James*, then in possession, and James re-entered.

Upon an ejectment brought by Pitts, judgment was given for the defendant James. The case was divided into two great points: 1. Whether this were not an hospital dissolved and given to the king by stat. 1. Edw. VI. of chantries? 2. Whether the lease, under which the plaintiff claimed, was made according to the name of the corporation or not?

1. The court were of opinion, that it was a superstitious hospital, and therefore vested in the crown, and that the plaintiff could have no title; that though the word "hospital" was not in the law of 1 Edw. VI. as it was in 37 Hen. VIII. yet that was not material, for the life of the law, which is the meaning, did not, upon the statute of 37 Hen. VIII. reach to hospitals erected merely for poor without superstition, though the word were there; and this law, without the word reached to them, being superstitious. And therefore, where all manner of colleges are given, yet the colleges of the university are not given, but superstitions only (under which word this being a collegiate body, superstitions is well and literally given). And yet where a law is made beneficial for good colleges, it shall be extended in their favour, as *Dyer, 255.* The statute of 1 P. & M. to make good devises

devises to spiritual corporations, was extended to Trinity college, Cambridge, because it was principally ordained for the study of divinity; for it clearly would not have been so in a college ordained for physicians or civilians. And therefore it was clear that the proviso in the statute of colleges in the university was but *abundans cautela*, as was ruled in *Porter's* case for Terry's will. And yet the statute gives the king power to change superstitious uses in such colleges, so the universal decree of state was, not to tolerate any superstitions any where.

Held clearly, that parochial priests were not within the law, though they were within the words. And therefore, (1) if a man had in time of popery given land to a parochial priest for his better maintenance in his function, and saying of divine service, this had not been within the law, though the ordinary service were at that time superstitious; for the original of his function was not for superstition but for God's service, which stands by public authority, but grew to abuse afterwards. But if a man give land to a parish-priest to pray or say mass for his soul, this is within the law, as it is held in Dyer, 337, for to this purpose he is a soul's priest, and not a parochial.

The same, of all chapels of ease, erected merely as members of the parochial church, and for that public use, that they had been out of the law, though there had been no proviso for them; otherwise it would be if they had been erected for obits at the first; and the same of cathedral churches, though they had not been named.

Yet the statute gives to the king chantries in them, so the statute was not so good to churches as to colleges. Thus it was held, that this hospital was within the law in the first and second branches; as a superstitious collegiate body legally incorporated, and therefore, in that point, stronger than the case of the collegiate church of *Lanway*

Lanway Brevy, which was but a pretended corporation. Dyer, 167. And it was observed, that this statute did mean to extend to lay corporations and companies as well as spiritual: for it hath one clause of plain gift of all gilds, &c. except of crafts and mysteries. Again, it gives all profits paid even by corporations of mysteries. And a third clause, that it should not be prejudicial to general corporations of cities or towns.

And though it was said there was never judgment given of a lay hospital for relief of the poor, it was answered, that this hospital was not so much erected for the relief of the poor as for prayer for souls; so this, indeed, was a superstitious conventicle; for it is truly said, in *Adam's* case, that prayer for souls was the general matter of all obits, anniversaries, and the like, which were but several forms of prayers for souls. And even in *Adam's* case in *Barton's* will, the land is given to his friends, and one use appointed for six poor folks; but, because it was to pray for souls, it was adjudged within the law, which is in effect and reason a judgment against lay hospitals for poor ordained so to pray for souls: for it is one in reason, whether the poor ordained so to pray be aggregate in one body, or divided as several persons, as they were there, and in many other cases cited in that case, if their maintenance end in prayer for souls. The tenant is bound to pray for the soul of the founder; yet there was no such thing expressed in the tenure, but to hold in frankalmoigne, but the reason of the gift, and intent of the giver, supplied the rest.

If the whole hospital had not been given to the king, the clause of obits, anniversaries, &c. clearly would have given the lands to the king, because the whole was given for such purpose, viz. for prayer for souls; and stronger than the case cited in Adam's case, where such gifts were but

but in part but uncertain, so as the king must have all else he could have nothing. But this clause could give the king nothing, because the verdict found no employment within five years, which upon that clause was necessary, but not upon the other, which gave the very college or hospital itself to the king.

But in general the caution must be observed, that the superstition must be plain and not imaginary, and therefore, in *Porter's* case, the will made provision for the maintenance of beadsmen. Now, though the praying by iteration of numbers and beads was a superstitious vanity, yet because the word of beadsmen was grown into a common acceptation for poor people praying for their benefactors, it was not presumed to be for the souls of the dead, though it were commonly so used, and so was judged no superstitious appointment.

2. Now in the second great point, the true name was not found in a direct clause, according to the modern and exact form, but it was only made by collection; the minister being named by himself exactly in the king's license, but the poor were not there joined in the name, but afterwards in the grant of the land; and so more fully and directly to be gathered out of connexion of the clauses than in Dr. *Eyrie's* case, &c.

If a man covenant to stand seized to the use of I. S. his cousin, he need not aver that he was his cousin, and yet it is necessary, but it must come on the other side; and this is but a surplusage to make the name a little more certain, which before was lawful and perfect of itself. But you must not so follow the truth of the present, that you lose the known name and notion, which is the use of nomination, as in the case of *Hall* v. *Wingate*, where *Windsor* college, being founded by Edw. IV. by the name of "the dean and canons of the king's free chapel

chapel at Windsor," the lease was made in King *Philip's* time, by the name of the king and queen's free chapel, for this was a variance in the very body and substance of the name, not in the excrescence, though it were in some sort true. But the words brethren for *confreres*, almshouse and almsmen for poor-house and poor men, brethren of the house for brethren of the minister, were differences not regarded. The great objection was, that where the true name was *Minister Dei pauperis domus*, it was made in the lease, *Minister pauperis domus Dei*, which was said to be an inversion, not only of words and order, but also of sense and matter.

The hospital was declared to belong to the crown, and the lease therefore to be void. See Atty. v. Hicks, ch. 1. s. 10.

The modern rules which the court has laid down, relative to leases of charity lands, will fully appear in the following cases.

Upon an information against the corporation and lessees of *Stamford*, and the representative of a then late schoolmaster, for misemployment of the profits of certain lands given to the free-school there; which had been applied to the corporation: Atty. v. Stamford. 1747. MSS.

Lord Hardwicke held,

1st. That where a lease is made by trustees at an undervalue by collusion between them and the lessee, the court of Chancery cannot only make a decree against the trustees, but also against the lessee for the surplus value; but this is to be done only where the circumstances of such collusion are very strong.

2d. That where power is given to the trustees of a charity to make leases generally (as in this case) they have a power both in law and equity either to take fines or reserve rents, as is most beneficial for the charity.

3d. That where in the donation the feoffees are direct-

ed to apply the rents "towards the necessary finding a master," and "for the pains of such master," and they apply part of the profits towards rebuilding and repairing the school-room and school-house, this is a good pursuance of the trust, because a school-room and house are necessary; and if these are not provided by the trustees, they must be provided by the master himself: and so it is (in effect) applied for the pains of the master; and here the words of the donation being, that Mr. *Ratcliffe* intending to found and erect a school, &c. these seem to shew that a new school was to be built.

4th. That, in this case, in the leases made by the mayor, alderman, and burgesses (the trustees) there being covenants from the lessees for grinding at the corporation mill, such covenants were improper, and ought not to have been inserted.

5th. That though this information, as to the matter of relief ought to be dismissed (there being no misapplication of the rents or collusion), yet as the charity was never established, either by a commission of charitable uses, or by decree, it was then proper to establish it; and the lord-chancellor mentioned the case of *Dr. Friend and the Dean and Chapter of Westminster*, (when Sir Robert Raymond was attorney-general) where the same thing was done.

The information as against the representatives of the past mayors of S. and of the late schoolmaster and the lessees, was dismissed *with costs*, no misbehaviour being proved against them; but as against the corporation of S. *without costs*, on account of an order made by them, that in the charity-leases there should be covenants for grinding at their mill; and lord-chancellor said, he would not give costs for this reason, rather *in terrorem*, than because the charity suffered by such order; and declared the

the charity to be established, and decreed the same accordingly. And referred it to the master to consider the best way of making leases, and of keeping the school-room and house in repair, &c. and report the same.

A lessee of land erected a chapel in the knowledge of the lessor, who did no act to obstruct it: Held, that the lessee did not thereby acquire a right, either to the chapel or to the nomination of a minister. 1 Dick. 368. Atty. v. Lord Foley. 1753.

Where part of the rents of an estate was appropriated to a charity recently founded, and power reserved to the founder to make leases to the amount of the part appropriated to the charity, the surplus, if any at the expiration of the lease, was declared to result to the charity under the general trust, and not to the heir-at-law. 2 Ves. jun. 1. S. C. Atty. v. Former. 1792. See 2 Vern. 145. Atty. v. Smith. 1716.

A lease void in its creation, as against a remainderman, does not become valid by his accepting rent, and suffering the lessee to make improvements after his remainder vests in possession. Doe v. Butcher. Doug. 51.

Doubts having arisen, whether ecclesiastical or college leases, or those of any masters or guardians of any hospital, who by statute of Hen. VIII. were restrained from granting leases whereon the accustomed yearly rent was not reserved, could lawfully grant separate leases of parts of lands usually demised by one lease and under one rent, reserving on the several parts so demised less than the rent anciently reserved on the demise of the whole, though the aggregate amount of the rents so reserved on such separate demises should be equal to or exceed the amount of the annual accustomed rent for the whole: the inconvenience arising to many persons, when such leases had been so granted, if they should be deemed invalid, and the power of dividing lands anciently held in one parcel at one rent, might tend to improve the value of estates, as well as to the benefit of the lessees and 39 & 40 G. 3. c. 41. 1800.

the public; the legislature enacted, that where the residue remained in the lessor, such rents should be deemed the ancient rents within the statutes of 32 H. 8. c. 28. 1 Eliz. c. 19. 13 Eliz. c. 10. and 14 Eliz. c. 11.

But such demises were not made valid, unless the rents reserved should be so far equal to, or exceed the whole amount of the ancient rent, that the part not demised should be sufficient to answer the difference.

Where the whole of the premises shall be demised in parts by several leases, the aggregate amount of their several rents shall not be less than the old accustomed rents of the entire lease, and where a part only is demised, and the residue retained by the lessor, the rent of the separate lease shall not be less in proportion to the fine on granting the lease than the rent, accustomed to be reserved for the whole of the premises, was in proportion to the fine received on granting the last entire lease.

But no greater proportion of the accustomed rent is to be reserved by any such separate lease than the part of the premises thereby severally demised will reasonably afford a competent security for.

A specific rent, incapable of division, may be wholly reserved out of a competent part of the lands, &c.

Where no rent is reserved, such lease is not confirmed by this act; and these provisions are not to authorise the reservation of any rent by 18 Eliz. c. 6.

Where the rents have been made payable to other persons than the lessors, such separate leases may provide the same payment of the lands charged therewith, not being of less annual value than three times the amount of the payment so charged thereon, exclusive of the proportion of rent or other annual payments to be reserved to the lessor; but this is not to be construed to establish

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the claim of any vicar, schoolmaster, &c. to any sum, the payment of which depends on the will of the lessor.

Trustees and others holding such original leases may surrender them, in order that such separate leases may be granted.

The acts made for the redemption of the land-tax, provided that it should be deemed an additional yearly rent in ecclesiastical leases. 39 G. III. c. 21. s. 10. c. 43. s. 5. c. 108. s. 6. And that trust property may be applied by parishes in redemption of the land-tax, on lands settled to charitable uses. 39 G. III. c. 6. s. 31. and by other charities, s. 32. c. 43. s. 6, 7. 39 and 40 G. III. c. 30. s. 5, 6, 7.

Where long leases of charity lands have been procured upon terms very inadequate to their fair value, the court has in several instances interfered to annul them, and to bring the lessees to a just account of the rents and profits: thus, in 1715, a charity estate then let at 31l. a year, having upon it some buildings considerably out of repair, was demised by the trustees for 999 years, in consideration of an additional rent of 4l. and 500l. to be laid out in repairs. The present annual value was between 90 and 100l. 6 Ves. jun. 452, 1801. Atty. v. Green.

This was considered a new case, and stood for judgment.

Lord-chancellor Eldon said, I can find no precedent for the regulation of the judgment in such a case. I take the defendant to be the personal representative of his grandfather, to whom this charity estate was demised by this lease; which is in effect a purchase of the perpetuity for that increased rent of 4l. a year, and a sum to be laid out; making the fund, that was to produce the old rent and that additional rent, so much better security as an expenditure, not to be short of 500l. would make it. It

is impossible that a person taking in good faith would take such a lease as that. The difficulty is, how to give a person, not taking in good faith, the benefit of that situation, that I would give a trustee laying out money for the benefit of the charity, and desiring, for his own benefit, that sort of interest in the charity fund that would secure him the re-payment. I am in a good deal of difficulty how to deal with the case. I apprehend the result of an enquiry, having the object of securing the lessee that benefit, would be, that he is already paid. He must have credit for having paid the original and additional rent. He cannot have credit against the charity for having expended more than 500l.; for it would be much too dangerous to enquire, by the evidence of persons making valuations now, and speculating upon the price of buildings in 1715, and the possible value of what they conceive, for they cannot know any thing as to the value of the old materials upon the premises. It is safer, therefore, to proceed upon the evidence the deed furnishes; concluding, that the trustees called upon him to lay out not less than 500l. and to say, that is all he ought to be taken, under these circumstances, to have laid out. If so, he must have 25l. a year interest upon that 500l. since the expenditure; which, with the rent, would be 59l. a year. Then, this interest being satisfied by that rent, the question upon the enquiry would be, whether the 500l. must not be satisfied now by the excess of the rent beyond the 59l. a year, about 30l. a year going to sink the principal; which would be entirely sunk in eighteen years. I must either order him to deliver up the lease without any allowance, or direct the inquiry, whether the principal of the 500l. has been paid by the excess of the rent beyond the rent reserved and the interest of the 500l.; and reserve the consideration of what is fit

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to be done till after that inquiry. In these cases it is necessary, upon a general principle, to hold a strict hand upon a person in the situation of this defendant: for where trustees make a lease of this kind, to the destruction of the charity estate, it goes on undiscovered for a vast while. Several days afterwards, Mr. Romilly observing that it was proved, that large sums had been expended lately upon the buildings beyond the 500l. and 100l. a very few years ago, the lord-chancellor said, he was not aware of that; and the relators not objecting to that inquiry, it was directed by consent; and the defendant, undertaking to deliver up the lease to be cancelled, and account for the rents and profits from the decease of the late vicar, the decree was made with costs.

The foregoing case of *Attorney* v *Green*, was relied on in a subsequent case, upon an information filed to compel the surrender of a husbandry lease of charity land for a long term of 99 years, considerably below fair considerations, although it appeared that money had been laid out; and both cases were insisted on as tending to an annihilation of the trusts. 10 Ves. jun. 555. Atty. v. Owen. 1805.

The court will put the lessor and lessee, to shew that the terms were reasonable, and done in the fair management of the estate. The ordinary husbandry lease is 21 years; building leases are sometimes made under settlement for 60 or 90 years, but not for the same rent during the whole time. Calculators make very little distinction between an interest for 99 years and the inheritance; both paying the same rent. An alienation for 99 years of a charity estate, if a mere husbandry lease and without consideration (to be shewn by those who make and take the lease, to point out that it is a proper bargain, with reference to a husband-like manner of acting) is a lease which this court will not permit to stand, unless it is

shewn to be fair and reasonable, and for the benefit of the charity. Afterwards the lease was ordered to be delivered up, but without any increased rent, and without costs, as it was delivered up without trouble; but this was declared not to be a precedent for persons taking leases of charity estates, and in future they will not get off so easily.

14 Ves. jun. 324. Watson v. Hemsworth Hospital. 1807. Duke 49. 2 Vern. 596.

If the founder give directions for the granting and renewal of leases, as that the tenants may reap some benefit of the premises vested in charitable uses, prescribing the term not to exceed 21 years, nor to be at any time raised, nor any fine to be charged above three years' rent, &c. and afterwards these leases be settled under decrees made upon the execution of commissions for charitable uses, by 43 Eliz. c. 2. and a lease granted with a covenant for renewal to the same tenant and his representatives, and to no other person; it has been stated, that the tenant cannot be entitled to a perpetual renewal, for this would exceed the limits prescribed by the foundation, as in *Lidiard* v. *Foach*, *Taylor* v. *Dulwich College*. The former decrees, made under the commissions, did not establish any such rule.

2 Vern. 410. 1 P. W. 655.

2 Vern. 746.

The only case in which a perpetual renewal is decreed was in plain and unambiguous terms, in *Atty.* v. *Smith*, which was done upon Smith having recovered for the charity an estate which had got into patentees' hands as concealed land.

The court will not look to the words of a lease for the construction of a former decree; and if, instead of an implication from the covenant, the hospital had entered into a distinct covenant to renew, it would have been of no validity.

Here I must venture to suggest, with due deference to some of the cases, that, whatever the apparent benefit may

may be in the bargain proposed, and whatever may be the extent permitted by any local statutes for granting leases, the restriction of the former acts of Henry and Eliz. must be strictly regarded to secure their validity; and although the statute of 5 Geo. III. c. 17. s. 2. limits them expressly not to exceed the terms of their local statutes, it does not relax the restriction of 21 years, or three lives, in any case where those local statutes may have extended them beyond that period.

And therefore trustees for a charity cannot in general, unless specially empowered, grant a lease for 70 years, except for the purpose of building; a case may occur, in which the property cannot be made beneficial without building, and the trustees might have no fund. Where trustees are restrained by the constitution of the trust, as well as by the general law, from granting long terms, any such leases may be set aside as a breach of trust; and as to the conditions of a lease, they cannot be permitted to be such for a charitable estate, as no man dealing for himself would grant; if the rent be inadequate it ought to be set aside; the court is the paramount trustee of a charity. It must be consistent with the rule of letting, prescribed by the founder, as well as with the general principle, that where trustees are not restrained by any special rule prescribed, their discretion is exercised improperly, by granting a lease inconsistent with the fair and beneficial administration of the estate in future times; also it must not be tainted with fraud or imposition upon the trustees, which, from the circumstances, may be inferred; as a diminution of the rent from a former rent; a long arrear; and a concealment of the increased value of the estate; or any imputation of collusion with them.

13 Ves. jun. 565. Atty. Griffith. 1807.

Atty. v. Talbot.

Breach of trust in such cases, without absolute fraud, is

is sufficient to obtain relief. The principle established
10 Ves. jun. 555. by the case of *Attorney* v. *Owen*, is very sound and important, and ought always to be kept in view in these cases; that a long lease of a charity estate is *primâ facie* a breach of trust; and the proof of the circumstances that make it a provident administration is thrown upon those who take such a lease.

If a lease is not made in a due execution of the trust, calculated for the protection of the charitable interests, all the undue advantages made by it are to be considered as in fact an alienation to the prejudice of the charity, capable of being reached by the equity of the court, for the purpose of being rendered advantageous for the benefit of the charity.

It is a perfectly well recognised and settled principle, that trustees, whether for infants or for charities, together with those to whom they give derivative interests, and who are also trustees of those interests, derived to them through the breach of trust by the former trustees, act under an obligation to use reasonable providence in the execution of the trust; and the proposition, that in general it is reasonable providence to make a lease at a rent not increasing in 70 years, an interest, the value of which is not very far short of the value of the inheritance, and no other consideration than a rent, admitted to be adequate at the commencement, is of such a nature as at least not to exclude the power of the court to call upon those who are concerned, to shew that this *primâ facie* most improvident lease is reasonable; and the duty of the explanation lies upon them.

If there is no power of leasing, that power falls under the general restraints imposed by the general principles of the court; if there is an express power, its terms must

pursue

pursue those limitations; particularly as to its rent, duration, and conditions.

If the trustees negligently suffer an arrear of rent till the debt becomes so high as that any distress is inadequate to discharge it, they are liable to make good to the charity any deficiency; and if they make part of their arrangement with their tenant that he shall surrender his lease and take a new one upon terms not equally beneficial to the charity, it may be set aside.

A court of equity will not endure that the representation of the tenant as a hard bargain to him, and the payment of arrears, are to be considered as a fine; unless they recorded to demonstration that it was the only mode by which that arrear could be recovered.

Courts of justice eannot give way to feelings for the situation of persons whose hopes are disappointed by succeeding to property, valuable in interest, where the consciences of those individuals are not affected; and their attention is seldom called to the consequences. On the one hand, care will be taken not to press too hard upon persons whose enjoyment has been permitted by the negligence of trustees and the abstinence of persons having beneficial interests; yet on the other, not by falling short of the just degree of retribution to encourage litigation; and to put those who are interested in the administration of these public institutions under difficulties.

Lord Eldon thought this lease would have been good at law, and that a lease made under a power by a person having only a particular estate, if not conformable to the power, is not good; but where persons granting the lease have at law the inheritance, with directions only how they are to execute the lease, the legal estate will pass from them.

His

His lordship added, "It is absolutely necessary that it should be perfectly understood, that charity estates all over the kingdom are dealt with in a manner most grossly improvident, amounting to the most direct breach of trust: and it would be highly dangerous to say, trustees and lessees of charity estates may engage in transactions that are gross breaches of trust; and, when the estate has been used in a manner contrary to the intention of the founder, for a great length of time, when 50 years may have run out, the court of Chancery is to modify, qualify, and by correction and emendation set that right at last, which ought to have been right at first. That would be a most dangerous mode of dealing out the doctrine of that court."

But while the court may think fit to call in and cancel any such leases, it does not follow as a consequence, that under-leases should also be called in, that might disturb other interests not founded on any corrupt practice, and might deprive the charity of the benefit of them; and therefore they may be suffered to remain for the benefit of the charity, and be assigned to the trustees.

But it is time to mention several legislative regulations affecting the leases of some particular charitable corporations.

Greenwich Hospital.

The strength and safety of Great Britain and Ireland, and their dependencies, having greatly depended upon the supply of the navy with a competent number of able mariners and seamen, who may be in readiness at all times for that service; and the seamen having distinguished themselves throughout the world for their industry and skill, and by their courage and constancy manifested in engagements for the defence and honour of their native country—in order to encourage them to continue this their ancient reputation, and to invite greater numbers of the people to betake themselves to the sea, it was reasonable

able that some competent provision should be made, that seamen, who by age, wounds, or other accidents should become disabled for future service at sea, and should not be in a condition to maintain themselves comfortably, might not fall under hardships and miseries, might be supported at the public charge, and that their widows and children might be provided for and educated. *Greenwich Hospital.*

King William and Queen Mary, therefore, determined that an hospital should be erected and endowed for this purpose, and by letters-patent, dated 25 Oct. 1694, granted to trustees, in fee, a piece of ground in the parish of East Greenwich, in Kent, part of the manor of East Greenwich, and the capital messuage called the palace of Greenwich, and several other buildings, that they might be converted to the use and service of such an hospital, and as an encouragement of navigation. And by further letters-patent after the death of the queen, dated 10 Sept. 1695, his majesty constituted commissioners, and granted an annual sum, payable out of the treasury, with directions for carrying on and perfecting the hospital, and for endowing and maintaining it, and the persons to be placed therein. This grant was confirmed by parliament in 1700. Considerable other benefactions were added to the royal munificence, and the whole was completed in the reign of Geo. II. 12 & 13 W. 3. c. 13.

By act of parliament in 1696, a register was appointed for all such mariners, watermen, seamen, fishermen, lightermen, bargemen, and keelmen, as would voluntarily enter their names for the sea service, and who should be entitled to receive the benefits of the hospital. 7 & 8 W. 3. c. 21.

Several acts afterwards passed for its completion, support, and interior government, particularly those for vesting the rents and profits of the forfeited *Derwentwater* estates, with powers to the commissioners to appoint receivers, 8 G. 2. c. 29. 1735.

Greenwich Hospital.

receivers, and to grant leases of the forfeited lands for 21 years, in possession, and not in reversion, at the best yearly rent, without fine, with condition of re-entry and restriction against waste. Six months' previous notice of letting them to be given in the gazette. A power was vested in the attorney-general, or in the mortgagees of the estates, to apply to the court of Exchequer, by motion in a summary way, for the sale of the fee-simple of such parts of those estates as should be sufficient to discharge the incumbrances to any persons being protestants, and to apply any surplus to the hospital.—Sec. 7.

A gift of 2000l. was enacted to Lord Gage, for his activity and expences in recovering the said estate.—Sec. 11.

The forfeited estates being thus vested in the king in his political capacity, which never dies, a doubt was suggested whether the tenants ought to do such services, or pay such fines on the king's demise, as by the tenure of their estates, founded upon immemorial custom or otherwise, they would have paid on the death of any lord, in case he were a subject, a subsequent act in 1738, therefore directed, that upon any such future demise, all such fines should be paid to every successor of the crown, or in case the estates should be sold, to such other owner as by the ancient tenure thereof, or by any contract, law, or custom ought to be done in case such king or queen so dying were considered as a private person only, and not in his political capacity; and that all such fines which should become due to the crown, should be applied to the use of the hospital.

11 G. 2. c. 20.

The timber was ordered to be sold under an order of the court of Exchequer on motion, and the produce to be applied towards the discharge of incumbrances, and any surplus towards completing the buildings; and afterwards

afterwards to the support of the seamen of the hospital, worn out and decrepit in the service of their country; and after discharging all the incumbrances, then the whole of such sale to the hospital. The cutting down timber was reserved to the sign-manual.—Sec. 3. *Greenwich Hospital.*

Provisions were made for sale of unincumbered parts of the estates, to pay off incumbrances, by order of the court of Exchequer.

Power was given to the crown, by sign-manual, to authorise the commissioners of the hospital to grant leases of the coal or other mines on these estates, for 21 years, in possession, and not in reversion, reserving the best rents, without fine, with full liberty to the lessees to win and work them, without deeming any act necessary thereto as waste.—Sec. 5.

Authority was given to the court of Exchequer, on motion, to order the production of any contracts or deeds by which the premises were held; and the commissioners were empowered to reduce the rate of interest on mortgages.

In order to make provision for the descendants of the devested parties, an act was passed in 1749; part of the forfeited estates were settled in trustees for a term of 500 years, and then to revert to the hospital, freed from all attainders, subject to all customary fines, &c. The trustees to stand seized, subject to such terms, with powers similar to those of the former act, as to granting leases, &c. And the term was to be used for raising sums and portions for the descendants therein named, and their issue.

In 1752 the commissioners were empowered to purchase, and for all persons and corporations to sell some premises belonging to Morden college and others, in order to complete the buildings; with powers, where the parties refused 25 G. 2. c. 42.

Greenwich Hospital.

refused to treat, for a jury to be empanneled to assess their value in the usual way; and on payment of the purchase-money into the bank, the estates purchased to vest in the trustees.

And any sums paid to corporations or trustees, to be invested in lands for the same uses as those so to be sold. Sec. 6.

The commissioners were likewise fully authorised to purchase other lands, which should be deemed necessary for completing the plan; and they were protected from any disturbance of quiet possession for any want of form; but that any claimants might sue the receivers of the purchase-money.

In addition to various contributions, *Robert Osbaldeston* bequeathed to the hospital the duties paid on the tonnage of every vessel which should pass the North and South Foreland, held under the crown, and also three houses on St. Peter's hill in London. And King Geo. II. by letters-patent, dated 14 July, 3 Geo. II. granted those duties, in trust, for the hospital. His present majesty, by letters-patent dated 6 Dec. 1775, first incorporated the commissioners by the name of "The Commissioners "and Governors of the Royal Hospital for Seamen, at "Greenwich, in the county of Kent." And by an act in 1776, the barony and premises, and light-house duties, vested in trust for the use of the hospital, were divested out of all persons claiming any legal estate therein, and were immediately vested in the corporation for ever, freed and discharged of all right and claims upon any account howsoever. To be held of the crown as of the manor of East Greenwich, by free and common soccage-tenure; but subject to such quit-rents as they were then liable to, with services and fines by the tenants, according to ancient tenure.

16 G. 3. c. 24.

All

All stock to be transferred to the corporation, and all fines and penalties to be paid accordingly. *Greenwich Hospital.*

Sec. 8. All leases then subsisting declared to be valid, notwithstanding this act.

Part of the forfeited estates vested in the corporation were situate at Alnwick, Embleton, and Warkworth, in Northumberland, contiguous to some lands of the Duke of Northumberland; and it being advantageous for both parties to exchange them, a treaty was concluded for that purpose in 1778. And it was found that the giving six months' previous notice of letting any of the hospital estates, prescribed by 8 Geo. II. c. 29. would reduce the value of those where there are mines and minerals; and also that it would be very inconvenient that such lands should be let to different tenants not occupying the mines, which would frequently happen, unless the corporation could let them without advertisement: an act was, therefore, obtained in 1778, empowering the commissioners to exchange such lands with the duke, freed and discharged of all uses and trusts, for the hospital; and other lands in the parish of *Corbridge*, in that county, were vested in the corporation, freed of all former uses, and subject to the same limitations as were by any acts expressed, and then vested in the commissioners; to be held of the duke as of his manor of Corbridge.—Sec. 4. 18 G. 3. c. 29.

The corporation were empowered to grant leases of any such mines and minerals, and of any such lands as they should deem proper to be leased therewith, for any term not exceeding 21 years, without advertisement. Provided that no such renewals exceed 21 years from the making thereof, and that such rents and conditions be agreed as shall be most likely to increase the revenues of the hospital.—Sec. 5.

These are the chief statutes relating to Greenwich

hospital, and the estates by which it is endowed. There are many other acts for its support, by prize-money, and by contributions, and for its regular government, which it was not within the plan of this work to notice.

Mercers' Company.

The legislature, in 1748, granted privileges to the Mercers' company of extending the terms of their leases, in order to enable them to meet their pressing exigencies, and which, aided by the strictest economy, greatly contributed to form and effectuate a plan for liquidating their debts.

By indentures of lease and release, dated 3 and 4 Oct. 1699, inrolled in the court of Chancery, the *Mercers'* company of London granted to Sir *William Hedges* and others, as trustees, divers premises in London and Middlesex; and also one moiety of the Royal Exchange, London, and other tenements in and contiguous thereto; with the manor of *Mercers*, in *Londonderry*, in *Ireland*, and other lands in *Ireland*, in trust, in the first place out of the rents and profits to pay all such charitable gifts and payments wherewith those premises then stood charged; and, in the next place, to pay, free of all taxes and charges, certain annuities to be then granted by the company, at the rate of 30l. *per cent. per annum*, during the lives of the wives of clergymen, or of other persons that should survive their husbands, commencing from Lady-day, or Michaelmas-day next after the death of their husbands; and after payment thereof, for the company for ever.

And by indenture of lease and release, dated 15 and 16 May, 1717, likewise inrolled, the same premises were charged with such future annuities as should be granted

granted by the company, at the rate of 25l. *per cent. per annum.* *Mercers' Company.*

And by an indenture, also inrolled, dated 24 May, 1723, between the company and the surviving trustees, it was declared that all such annuities to be granted after Midsummer-day then next, should be only after the rate of 20l. *per cent.*

And by indentures of lease and release, dated 1 and 2 June, 1741, Richard Chiswell and others, the only surviving trustees, did, by the direction of the company, convey the trust-estates to the use of themselves and other trustees, upon the same trusts as were declared in the deed of 24 May, 1723, except as to future annuities, which were only to be at the rate of 15l. *per cent. per annum.*

And by indenture, also inrolled, dated 23 July, 1742, between the company and the trustees appointed by the indenture of 2 June, 1741, liberty was given to the company for the future to grant such annuities, at the rate of 20l. *per cent. per annum.*

In the year 1748, the income did not exceed 4150l. and the annuities due and payable amounted to 7500l. and upwards; and the arrears due at Michaelmas, 1747, amounted to 9628l. 2s. 6d. so that the estates settled for the payment of them were insufficient for that purpose; and many of the annuitants were in a very distressed condition.

Several persons had thentofore left to the company estates and money for charitable uses, and the Royal Exchange was by the dreadful fire in 1666 consumed, and the company, with the city of London, were at very great expence in rebuilding it; by which means, and by other public losses, the company had long laboured under great difficulties, and had borrowed large sums of

Mercers' Company.

money upon bond, and had otherwise become indebted in a greater sum than they were able to pay.

21 G. 2. c. 29.

The legislature, by an act passed 1748, directed that the imposition of 6d. per chaldron, and 6d. per ton of coals, usually sold by the ton, which by statute 5 and 6 W. and M. was granted to the city on all coals imported into the port of London from Michaelmas 1700, for 50 years, should be continued for 35 years from that period, and the yearly sum of 3000l. should be paid thereout by the chamberlain of London to the company during that term of 35 years, to be applied by the company towards the payment of annuities and other debts, as should by another act be directed.

21 G. 2. c. 32.

Therefore, in a subsequent statute of the same year, a general account of what should be due to the annuitants, was ordered to be kept by the wardens; the debt was deemed to be a principal sum, carrying 3l. *per cent.* interest: the above 3000l. to be applied towards the annuities, and the surplus towards the interest of the arrears, and afterwards to the other creditors. Assignments of annuities made since Michaelmas, 1745, were declared redeemable, and the wardens were restrained from receiving further subscriptions for annuities.

And it appearing that it might be for the benefit of the annuitants, that building and repairing leases should be let of the several estates in London and Middlesex, and that such of them as were in Ireland should be let for a term of years, or for lives and a term of years; the company were empowered, under their common seal, to grant leases for any term not exceeding 21 years absolute, in possession, and not in reversion, at the most improved rent, without fine or other thing by way of income, not dispunishable for waste. And also to grant leases of the manor of *Mercers*, or any part thereof, for a term not

not exceeding 61 years in possession, or for 61 years in possession, and for three lives, and the life of the longer liver of them; and to take such fine or other consideration, and reserve such rents as could be reasonably obtained, so as the rent should not be less than the rent then reserved to the company. And also to lease their premises in *Long-acre*, and all other tenements belonging to the said estates which they should deem necessary to let, upon building or repairing leases, in the usual manner of such leases, viz. the building leases for any term not exceeding 61 years, and repairing leases not exceeding 41 years from their dates; and to take such fines and rents as they should think fit: in which building leases power should be given to the lessees to pull down and demolish the old buildings, and to dispose of the materials; with a proviso, that no lease of any part of the estates, except those in Ireland and Long-acre, should be granted till within three years next before the expiration of such leases as were then in being. *Mercers' Company.*

The trustees afterwards declined acting in the trusts, and the powers so given to the company were insufficient to enable them to grant such leases of the estates in Ireland as they had intended, as the power given limited them to 61 years in possession, or for 61 years in possession, and for three lives; and the Irish estate was then let on leases still unexpired. And the power of granting leases for three lives being a power to grant a freehold, the same could not, by the rules of law, be granted to commence *in futuro*; so that the company could not, under the preceding act, legally grant any such leases of the Irish estate, until the leases in being had expired, or were surrendered. And as it would be advantageous for the annuities that the company should be vested with a power to grant leases of the Irish estate, to commence

Mercers' Company. at the expiration of those subsisting, reserving the present rent, and taking the best fine:—They were, by a subsequent act in 1751, empowered to grant leases of their Irish estates, in reversion, for 61 years from the expiration of any existing lease then unexpired; *or* to continue from thenceforth during three lives, to be nominated by the lessee, and inserted therein, and the life of the longer liver of them; and from the decease of the survivor, further to continue during and unto the expiration of 61 years, to be computed from such determination of the term for which the premises were then so leased out, and take such fines accordingly: building leases for 61 years, and repairing leases for 41 years of their estate in Long-acre; and of their other estates in London and Middlesex for 21 years; and grant building and repairing leases for 61 and 41 years, without fine: the leases in London and Middlesex not to be granted till within three years of the expiration of the current leases. No leases to be valid unless consented to by the annuitants and creditors. Deeds and settlements not altered by this act, and the rights of the crown and other persons preserved.

24 G. 2. c. 14.

By some mistake the word *or* here inserted in italics was inserted in this act, which defeated one of the purposes of the powers granted to the company, which another act in the following year was passed to rectify.

25 G. 2. c. 7. 1752.

Morden College. King Wm. III. by letters-patent under the great seal, dated 4 Nov. 11 W. III. granted, in trust, to Sir *John Morden*, Bart. in fee, the manor of *Old Court*, in the parish of East Greenwich, in Kent. Sir John erected the college for the comfort and support of aged and decayed merchants, near Blackheath, and by his will, dated

dated 15 Oct. 1702, devised all his real and copyhold estates to trustees, in fee, for the use of the college, and for the maintenance and support of poor, aged, and decayed merchants of England, whose fortunes had been ruined by the perils of the sea, and other unavoidable accidents. The trustees afterwards came into possession of divers parts of a parcel of land in the same parish, called *Maidenstone-hill*, on an apprehension that it was part of the manor of Old Court, and granted leases, and erected houses thereon, until it was claimed by the crown as part of the royalty of East Greenwich; and informations of intrusion were exhibited by the attorney-general in the court of Exchequer against several of the lessees. Whereupon, to stay the proceedings, and to save expences to the charity, an agreement was concluded in 1770, betwen Peter Burrell, Esq. the surveyor-general, and the trustees of the college, stating proposals made by them to the treasury, offering to admit the right of the crown, upon being acquitted of all arrears, and having a proper consent to an act of parliament to indemnify them, and to enable the crown to grant to them, without fine, a lease of the whole hill for 50 years; and to renew such lease from time to time, for any further term not exceeding 50 years each: and the trustees offered one-third part of the net income which they then received for the hill as a rent; and to pay one-third part of the net income, which at any such renewal they should receive as a rent; and declared their willingness to be restrained from taking any fine for building leases, or for renewals of leases of any houses already built there; and that after a reference to their surveyor, the treasury agreed to those proposals, under certain restrictions. The treasury agreed, in consideration of such admission, to release the college from the *Morden College.*

Morden College. arrears, and consented to an application to parliament for such indemnity, and for enabling the crown to grant such leases; and that on such act being obtained, such lease should be granted: and in case the crown should be pleased to renew the same, it should be granted on the terms proposed, with proper covenants restraining the trustees from erecting any buildings whatsoever on any part of the top or plain of the hill, or inclosing it without consent of the crown; and from digging and carrying away any soil, chalk, lime-stone, or gravel of the hill or waste ground, and from taking any fine for building-leases, or for renewals.

11 G. 3. c. 10. 1771. This agreement was then ratified and confirmed by statute, and the rent received by the treasury was directed to be applied to the general and aggregate fund established by 1 Geo. I. and that such grant or demise from the crown as should be made by any letters-patent, or indentures under the great seal, should be good and effectual in the law, according to the purport thereof, notwithstanding any restriction in 1 Anne, for support of the queen's household, &c. or any other statute, or misrecital, or other defect.

The founder had also, by his will, directed that there should be placed in his college so many poor merchants as the then yearly rents and revenue of his estates would maintain, allowing to each merchant 20l. per annum to be laid out in provisions and necessaries, and that a treasurer should be appointed, at a stipend of 40l. to collect the rents of his estates, and let the same, and pay the produce accordingly, and also a resident chaplain, at a stipend of 30l. to officiate daily in the chapel, and by a codicil he reduced the pension of each merchant to 15l. These stipends were afterwards found inadequate to the care and attendance which a due execution of those offices

offices required, and the pension was too small to induce merchants of a liberal education, who had fallen to decay by unavoidable accidents and unforeseen events, and were aged and infirm, to apply for a participation of the charity. In order, therefore, to encourage them to apply for admission, and that the pious and charitable intention of the founder might be more effectually carried into execution, this act empowered the trustees to increase the salaries to those officers as they should think reasonable, not exceeding 50l. yearly, and the pension not exceeding 40l. yearly. *Morden College.*

The statutes made by Edward Alleyne, in 1619, the founder of God's Gift college, at Dulwich, for its government, pursuant to the letters-patent under the great seal, dated 21st June, 17 Ja. I. ordained, that no lease should be made of any lands which he had given to the college, but at one of the public audit days, for no longer term than 21 years, with a valuable rent reserved and without fine; nor to any member of the college; and that no part of 200 acres of coppice and wood land, nor so much of the arable and pasture lands, which should be used as a demesne for provision of the college, should be demised in lease to any person whatsoever, but should remain in hand and be husbanded to the best advantage, for the better and more easy provision of bread and beer, and other victuals, as also for fuel for the college. This use has been superseded by the subsequent introduction of coal. *Dulwich College.*

The college thus being restrained by its statutes from granting leases for a longer term than 21 years, agreed with Taylor, a lessee, by a resolution entered and signed in their minute book, that at the expiration of his lease a new *Taylor v. Dulwich College. 1 P. W. 655. 1720.*

Dulwich College.

new one should be granted to him, at the old rent, in consequence of improvements which he had made. When the lease expired an order was made and signed in their book to that effect, but upon his death his representative afterwards applied for it, and it was refused; whereupon he proceeded to compel a performance of this contract; the court reproved the master-warden for this breach of his trust and inconsistency with his oath, that the recommendation was to wrong the college, and break their statutes, which say that no lease should be made but at the rack-rents; that the signing such a minute could not be deemed such a contract as binds the college, for that must be under its seal; *and* as to the equity raised by the tenant's improving and building on a reliance of this order, he had his remedy against the parties as private persons who signed it; and what had been laid out in repairs since, were not more than what he was obliged to do by his old lease. The bill was therefore dismissed with costs.

This corporation of God's Gift college is lord of the manor, and as such entitled to the soil of the common and waste lands within the manor. These common and waste lands, within the parish of Camberwell, contain about 130 acres, which were in a condition incapable of improvement, and therefore the corporation obtained an act in 1805, to enable them to divide the same into allotments and inclosures, on the general principles of other inclosure bills, with penalties for cattle feeding and straying, and powers to stop up and turn any ancient bridleways, footways, or paths, with the concurrence of two justices, subject to appeal to the quarter sessions, and reserving to the corporation one-sixteenth part of such common and waste grounds as a full compensation for their right. All grants, limitation of uses, leases, and charges existing

existing at the time of any such division and allotment, were saved; all encroachments and inclosures made within 20 years before this act were deemed part of the waste, but not to be disturbed, and the commissioners to allot them to the proprietor, according to their intrinsic value, at the time of the encroachment. *Dulwich College.*

The college estate being in every part very eligibly situated for building, many persons have been induced to erect very substantial houses, and lay out considerable sums in gardens and conveniences there, trusting to the honour and good faith of the college to renew their leases at the period of their termination; but this restriction has tended, in a great measure, to prevent the college-estates from being so much improved as those of any individual.

The college, therefore, have, upon a recent application to parliament, obtained an act, empowering them to grant leases to several of their tenants, who had entered into an agreement for that purpose, for a period of 63 years, on the usual covenants of leases of houses; and also to grant building and repairing leases of other parts of their manor, for any term not exceeding 84 years, in possession and not in reversion, or by way of future interest, with liberty for the lessees to take down buildings, and convert the materials to such uses as should be agreed upon, and to lay out and appropriate any part of such premises in ways and passages; the best and most improved rents being reserved; regard being had to the value of the buildings, if any; without fine or foregift. 48 Geo. 3

They are also empowered to extend the first-mentioned term of 63 years to any number not exceeding 21 years, at the like rent and covenants.

And the college being greatly out of repair, and the west wing in great danger of falling, and a fund having been

Dulwich College.

been for many years accumulating for the purpose of rebuilding it, which amounted to 5600l. 3l. per cent. consolidated bank annuities, a sum totally inadequate thereto; the act authorised the application of the monies, arising from fines and premiums, in repairing or in rebuilding the college, either upon its present site, or on such other part of the estates as the visitor should approve.

Saving to the crown and to all persons, except the master, &c. all such estate and interest in the lands and premises stated in two schedules, as they had or were entitled to at or before the passing this act.

A printed copy of the act is to be admitted as evidence thereof.

This act received the royal assent on the 18th June, 1808. By the schedules the rents appear to amount to 3784l.

The Archbishop of Canterbury is visitor of this college, by the appointment of the founder.

The college has been accustomed to keep the greatest part of their manorial estate in their own hands, there being only four or five copyhold tenants thereon; they have granted the rest chiefly in building leases, reserving all the timber, though they have made very little profit of this reservation until lately; but what they may have lost in revenue, their estate gained in beauty, which constituted a considerable part of its value, for it offered the principal attraction to opulent and respectable tenants; the intended inclosures and the long leases, which the college is now empowered to grant for the encouragement of building, together with the intersection of the manor by new roads, will, in addition to the period of some of the existing leases, considerably improve the revenues of the college, and will, it is to be hoped, enable them in due time to rebuild the western wing; and also to increase the

the purposes of the establishment; which consists of a lay-master and warden, three fellows who are clergymen in priests' orders, and an organist; six poor brethren and six poor sisters, all single and unmarried, with twelve poor scholars; these poor members are chosen from the parishes of Bishopsgate, Cripplegate, St. Saviour's, and Camberwell, and the village of Dulwich. *Dulwich College.*

Archbishop Burnet, at a grand visitation begun on the 16th July, 1664, directed amongst other regulations, that their leases should never be renewed but at the best improved rent without fines, after a view of the lands by a surveyor, and with the cognizance of the visitor.

By the statutes of the college the whole net proceeds of the revenues, after payment of fixed and proportional stipends to the several members, the charges of managing the estates, conducting the whole trust, and laying bye an annual sum, are divided in proportional shares amongst all the members; which is, in some respects, similar to the division of chapter property.

CHAP.

CHAPTER III.

OF TAXES, AND OF EXEMPTION FROM THEM.

ALL hospitals are erected and maintained for the relief of the poor and afflicted; public and voluntary contribution is the source from whence the great expence of their laudable designs is defrayed. The whole establishment is a work of mercy; and considering the extreme exigency of latter times, the liberality of the opulent is a monument of wonder to ourselves and to surrounding nations: however pressing may have been the demands of the state, however excessive may have been the luxuries and extravagance of the people in an age refined and polished as the present, still our charitable institutions have continually increased in number, in extent, and in wealth. But there are not many which have yet been so established as to become independent of, or indifferent to their annual contributions; a large capital is necessary to be laid up, before even a moderate income can be secured; and if their wants alone are all supplied, they must be said to flourish under the public favour!

From hence it should seem extraordinary that any taxes should ever have been levied upon charities: if it be contended, that every part of them, appropriated to the occupation of the afflicted, are exempted; still there is a seeming injustice to charge the revenues of the institution, with a tax upon those apartments where the officers and servants are lodged: it would be of no benefit to any patient labouring under the severity of some malignant disease, to be carried to an hospital, nor to be received

received or to remain unattended by nurses and proper persons appointed to restore or relieve him; and these persons must necessarily be indulged with some moments of rest and relaxation: it is obvious, the servants of an hospital are as essential to it, as any other part of its administration; and the directors would, for their own sakes, and the sake of its revenues, never employ one more than the immediate necessity of the case required.

The heavy charge of assessments upon officers' apartments, and of 10 per cent. upon all charitable legacies, which are placed on the same footing as those to strangers in blood of any testator, and of stamp duties for benefactions and subscriptions, form a considerable drawback upon every charity, struggling for the means of payment of its ordinary expences, and would not be felt by the state if they were relinquished; if it be alleged, that such an exemption would throw the hospital's share of any tax upon the rest of the people, it is fair and manifest to answer, that the burden, which thus would fall on each individual in any parish or district, is so minute, that if it were not pointed out to him he would never discover it in his annual expenditure; whereas, the whole share of every tax falling upon any charity very considerably reduces its revenue, and abridges and restrains the benevolent designs of its institution. Besides, where property is devoted to the poor, it seems inconsistent to subject any part of it to taxation. For these reasons, it, is humbly recommended to the consideration of the board of treasury, and, finally, to the legislature, to pass a general act of exemption of all charitable institutions from all taxes and assessments. For if any part of its lands are let at a profit, still that profit is or ought to be applied for the general benefit of the charity, and therefore should not be made subject of taxation. And if it be alleged, that

that the officers of some public charities hold very lucrative posts under its establishment, it may be answered, that their individual incomes are the most preferable object of taxation.

Land Tax. The annual acts heretofore passed for the land-tax, exempted the two universities, the colleges of Eton, Winchester, and Westminster, the corporation for relief of poor widows and children of clergymen, the college of Bromley, and all hospitals in respect of the sites thereof or buildings within their walls or limits; and also the master, fellow, scholar, or exhibitioner of any such college or hall, and any reader, officer, or master of the universities, colleges, or halls; and the masters or ushers of any schools, in respect of any stipend, wages, rents, profits, or exhibitions whatsoever, arising to them in respect of their places or employments; and also the lands, which, before 25th March, 1693, did belong to the sites of any college or hall, or to Christ's hospital, St. Bartholomew's, Bridewell, St. Thomas's, and Bethlem, or any other hospitals or alms-houses in respect of any rents or revenues, which, before that time, were payable to them, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and alms-houses only. But tenants thereto, who by their leases were obliged to pay all taxes, were not exempted; they were rated on their yearly value above the rent paid to the hospital.

And in general it was provided, that all such lands, revenues, or rents, belonging to any hospital or alms-house, or settled to any charitable or pious use, as were assessed in 4th Wm. and Mary, should be liable; and
A. D. 1693. no other lands, &c. then belonging to any hospital or alms-house, or settled to any charitable or pious use, should be charged or assessed.

All

All questions how far any such lands should be taxed, were to be determined *finally* on appeal, by three or more of the commissioners.

And the reason of this distinction seems to have been, because in that year the sums to be charged were fixed and determined upon every particular division; lands which were then appropriated to charities being exempted out of the valuation: therefore it is no hardship upon the neighbourhood, that lands then exempted should be exempted still, for the other lands paid no more on account of such exemption: but if lands appropriated to charities since that time should by such appropriation have become exempted, this would have laid a greater burden upon all the rest, because the same sum upon the whole division was to be raised still. 2 Eccl. Law, 815.

But now by the statutes for redemption of the land-tax, the trustees for charitable and other purposes, colleges and corporations, as well ecclesiastical as lay, are empowered to contract for the purchase of their land-tax, and to sell and exchange their lands for that purpose; those who are in possession are preferred to those in reversion, and those in reversion to all who had no interest previous to 1803; after which time they may all redeem it on the same terms, except as to the different periods of transfer, if no other offer should be made. 42 G. 3. c. 116. s. 17 & 19. Sec. 151.

And where any trust-property, under any statute, deed, will, or decree, is applicable to any charitable purpose for the benefit of any parish or place, it may be applied to the redemption of the land-tax, charged on any lands settled to charitable uses for the benefit of such parish or place; and such lands may be charged with any annuity equal to the amount of the income of the trust-property, which shall have been applied to such redemption, subject to the approbation of the justices. Sec. 47.

The governors and directors of hospitals and other charitable institutions may also apply any legacies or voluntary donations bequeathed or given to them, and not directed by the donor to be applied to any particular
Sec. 48. purpose towards this redemption. And any person may give or bequeath any sum to be so applied, charged on any lands settled to charitable uses, notwithstanding any
Sec. 50. statute of mortmain.

46 G. 3. c. 133. sec. 2. It was afterwards found that the profits to the public, from the redemption of the land-tax by corporations and trustees for charitable and other purposes, amounted to a very large sum, and was likely to be increased by their further sales, and therefore it became expedient to augment their incomes by exonerating their lands from the tax; the commissioners were therefore, in 1806, empowered by letters-patent under the great seal, within two years from the passing of that act, to direct this exoneration in cases where the whole clear annual income should not exceed 150l. without any consideration for the same; provided the annual amount of land-tax so exonerated should not exceed 6000l.

To effect this purpose the parties were directed, within six months of the passing that act, to transmit to the commissioners a memorial of the nature of their property, funds, or sources, and the amount of their income derived from thence, with a certificate from two of the commissioners of the district, stating a description of the lands charged, with powers to the special commissioners to extend the time for six months.—Sec. 3.

This provision expired 22d July, 1808.

10 May, 1809. Leave has been lately given for a bill to amend the act of 46 Geo. III. which amended the 42 Geo. III. for consolidating the several acts for the redemption and sale of the land-tax, and to make further provision for exonerating

ing small livings and charitable institutions from the land tax.

All lands within a parish are to be assessed to the poor's-rate. Hospital lands are chargeable to the poor as well as others; for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a great burden upon their neighbours. Per Holt, C. J. Poor's Rate, 43 Eliz. c. 2. 2 Salk. 527.

In the case of St. Luke's hospital, the above act and subsequent decision, were greatly narrowed in their comprehensive extent; for there it was determined by Lord Mansfield, in Mich. Term, 1 Geo. III. that the said hospital was not chargeable to the parish rates; and that in general no hospital is so, with respect to the site thereof, except those parts of it which are inhabited by the officers belonging to the hospital, as the chaplain and physician; and the like in Chelsea hospital: and these apartments are to be rated as *single tenements*, of which the officers are the occupiers. The reason why the apartments in this hospital of the sick or mad persons are not to be rated, is, that there are no persons who can be said to be the occupiers of them (and it is upon the *occupiers of houses* that the rate is to be levied); for it would be absurd to call the poor objects so with respect to this purpose; and the lessees of the hospital in trust for the charitable purposes to which it is applied, cannot with any propriety be considered as the occupiers of it, although part of its site may have paid poor's rate before its appropriation to that purpose; nor lastly, can the servants of the hospitals, who attend there for their livelihood; and no other persons can, with any shadow of reason, be considered as the occupiers of it. Burr. 1058. 2 Burn. Eccl. Law, 286. Rex. v. Barthol. 4 Burr. 2405. 1 Bot. 131. 2 Burr. 1058. St. Luke's, 1 Bot. 128.

The assessment to the poor in all parishes affecting hospitals and foundations of charity, has generally been

made upon the principle settled in this case; but some variations in circumstance, situation, or occupation of the parties, or of the property, have introduced further discussions and determinations, a few of which it may be sufficient to notice.

3 T. Rep. 602 Rex v. Scott, 1790.

The *Newport* school-houses, in *Salop*, were founded by *W. Adams*, and endowed by a considerable estate at *Knighton*, in *Staffordshire*, and vested by him in the haberdashers' company as trustees. In 12 Car. II. a private act of parliament was obtained, which was perpetuated by another act in the following year, whereby it was enacted, that the manor of Knighton, and all other lands settled by him for the purposes aforesaid, "be and at all times hereafter shall be freed, discharged, and acquitted of and from the payment of all and every manner of taxes, assessments, or charges, *civil* or *military* whatsoever, hereafter to be laid and imposed by authority of parliament or otherwise, and the manors, &c. and the owners and occupiers thereof shall not at any time hereafter be rated, taxed, or assessed, to pay any sum or sums of money, or be otherwise charged in any way whatsoever, for or in respect of the said manors, &c. for or towards any manner of *public tax*, assessment, or charge whatsoever, any statute, &c. notwithstanding."

In consequence of this act these premises had never been rated or paid to the poor of the parish in the memory of any person living, but the quarter sessions confirmed the rate now made.

In support of the order of session it was contended, that a private act ought to receive the same construction as a deed, and as the parish was not party to it, their interest ought not to be affected by implication: hence all the legislature can be supposed to have intended was, exemption from all general public taxes, and not from any

any particular local tax, as the words *civil and military* plainly refer to the public taxes of the kingdom; that this related only to taxes on lands, which could not be referred to parochial rates under 43 Eliz. it having been held, that that statute imposes no tax on the land itself, but only on the occupier. And when this act of Car. II. was passed, there were taxes on lands on which the words could operate; as, for instance, subsidies and assessments, in lieu of which the modern land-tax was substituted. That by the latter part of the clause the exemption is confined to *public* taxes. Now the poor-tax never was considered as a public tax in the general acceptation of the term; and accordingly, whenever the legislature have intended to include it, they have done it by express woods, as contradistinguished from public taxes, as in 10 Ann. c. 23. s. 2. 12 Ann. st. 1. c. 5. s. 1. and 18 Geo. II. c. 18. s. 6.

Lord *Kenyon*, C. J. said, these lands having been given for eleemosynary purposes, the legislature seem to have intended to exempt them from all public taxes whatsoever. And it is immaterial to the parish, whether these lands be exempted from the poor's rate or not, since if they be not exempt, greater contributions might be raised. If a construction of this act of parliament, manifestly erroneous, had hitherto prevailed, we should have been bound to correct it; though, indeed, had the words of the statute been very doubtful, the cotemporary and subsequent uniform usage would have had great weight. But without resorting to the usage in this case, the words of the statute are very clear and positive, for they speak of all public taxes whatsoever. The whole argument resolves itself into this, whether, in the idea of the legislature, at the time of passing this act, the poor's tax was a public tax. The acts which have been referred to in the

argument do not prove the point for which they were mentioned. But the other acts respecting the poor are decisive of this question. The statute of 3 W. and M. c. 11 s. 6. speaking of the means by which a settlement may be gained, says, that "if any person shall be charged with and pay his share towards the public taxes or levies of the said parish, he shall be adjudged to have a legal settlement in the same." Now on the construction of this statute, it never was doubted but that a payment towards the poor's rate was sufficient to give the party a settlement. His lordship was therefore of opinion, that the exemption which had hitherto prevailed ought to continue in future. The three other judges concurred, and the order of sessions was quashed.

Rex v. Waldo. Cald. 358. 1 Bot. 168. 3 Nolan. 116.

Mr. Waldo provided a house, previously rated, and placed ten poor girls in it, some being taken from that, and some from other parishes, who were educated, maintained, and brought up on his charity. He provided and paid a woman as his servant, to superintend and instruct them in reading and working, and qualifying them for service; this woman and the children were the only persons resident in the house, which was solely appropriated to the purpose, all vacancies being supplied from time to time at his discretion. He was held not to be an occupier rateable for this house, for he made no profit of the building.

5 T. Rep. 79. Rex v. Woodward.

So likewise a building, having been raised by voluntary contribution for a quakers' meeting-house, which was used only for religious and charitable purposes; and the remaining apartments were occupied by poor persons maintained by donations. No rent was received by the trustees who were subscribers to the fund for charitable donations; none of the seats were let or other advantage taken thereof. This building was held not rateable to the

the poor-rate, the trustees not having any interest in the premises, and there being no occupier, nor any profit made: on the authority of *Rex* v. *Walds.* Cald. 358. and *Robson* v. *Hyde.* Ibid. 310. and 4 T. Rep. 730. *Rex* v. *Salter's Load Sluice.*

But if any profit is made by letting the seats, or otherwise, the building is rateable. Cald. 310. 1 Bot. 166. 1 Nolan, 118.

Where there is property but no occupier, there cannot be a ground for taxation; if any interest can be shewn to result to any persons, there taxation vests. Trustees for a toll, or for an hospital or charity, having no interest for their own benefit, hold for the purposes of mere distribution, and those who receive the benefit are transitory, as in St. Luke's case abovementioned. It is otherwise where they are trustees for a corporation, which receives profits, and maintains its dignity and utility by its revenues, as in cities, dock, insurance, and bank and other companies. Tolls are exempted on the principle of the revenue being received and distributed for public purposes without any occupier receiving benefit.

The charitable purposes for which land is given in occupation does not excuse an occupier, who is otherwise within the act; land or houses granted to a charity are not less useful than the maintenance of the parochial poor, or even operating collaterally for their relief and assistance, and so far applied in exoneration of the rate, are notwithstanding liable, as in the following case. 1 Nolan, 116.

The Rev. *R. Dyer*, as master of a free-school at *Woodbridge*, was omitted in the assessment of the poor-rate. He was appointed by the parish under a deed of foundation of the school, and in which the house was assigned to the master free of rent. No rates had been assessed upon it for many years, but Rex v. Catt. 1795. 5 T. Rep 334.

he let part of the foundation-land, and the tenants were rated.

It was held, that where a person is found to be the beneficial occupier, he must be rated, though the house be appropriated to charitable purposes. By the old land-tax acts, certain property given for charitable purposes is exempted from that tax; but there is no such exemption in the acts respecting the relief of the poor. Those lands that are appropriated for the establishment of the religion of the country, are in one sense of the word lands given for charitable purposes; but parsonage houses and glebe lands, &c. are rateable in the hands of the occupiers: if there be any individual in the parish who objects to the omission of the defendant, the objection must prevail.

As to the occupiers of St. Luke's hospital, which was one of the first cases on this subject, the ground was, not that the house was given to charitable purposes, but that there was no person who could be said to be the occupier of it: the rate there was not considered as improper, because the property was not in itself rateable, but because no occupier could be found; but in this case there was an occupier. That part of the land given for the same purposes in this case, which was let out, was rated in the hands of the several occupiers: no objection was made to that part of the rate, and the court could not distinguish between the house and garden occupied by this defendant, and the land so let to those occupiers. The defendant was a beneficial occupier of the property for which he was rated—then here was that person an occupier, who could not be found in the case of St. Luke's hospital.

But the superintendant of a public institution, not reaping any other profit than salary and residence, is not rateable:

rateable: as the matron of the Philanthropic Society, in St. George's-fields, who had undertaken the management and tuition of the female children, under special agreement that all her and their earnings should be applied to the charity; in consideration of which, she was provided with a dwelling, free from rent and taxes, and with provision, residence, and a salary. She had no distinct apartment for herself, only a bed-chamber; her own family was not permitted to reside with her; and she had no other profit or benefit. She was, however, rated to the poor, and the sessions confirmed the rate with costs.

But on application to the court of K. B. it was held, that this was not her house—she was the servant of a society established to rescue from ruin and infamy certain poor children, who are thrown upon the world without any protection; to improve the behaviour and morals of those children, and to render those, who without such assistance would probably prove a nuisance to society, useful and respectable members of it: the benefactors could not undertake this themselves—it was necessary to find some other person who could superintend the whole. She was engaged as their servant—she was the housekeeper appointed to look after the economy of the house—she could neither put in or send out whom she pleased—she acted in a subordinate capacity, subject to the directions and control of the society. It might as well be said that servants are occupiers of their masters' houses, and so be rateable. She was liable to be dismissed at an hour's notice, on payment of her wages: the dwelling provided for her was mere lodging; if the bed-chamber constituted her an occupier, any maid-servant is such. The legislature meant only that beneficial occupiers should be rated.—The order was quashed.

Rex v. Field, 1794. 5 T. Rep. 587. 1 Nolan, 110.

This

This principle was again recognised in a subsequent case, where the persons resident upon a charitable foundation, were found to be beneficial occupiers, and therefore held liable to the poor rate.

1 East. 584. 1801. Rex v. Munday.

Lord *Rich* founded a charity at *Felsted* for certain poor persons, who were to cut and plant wood, keep cows, and sell calves, &c. for their general benefit and profit, to be spent in the alms-house:—they were rated to the poor upon the annual rental. In support of the order the former cases were cited, and they were shewn to be occupiers reaping a profit. It was urged, *è contra*, that the primary object of 43 Eliz. was to make persons of ability contribute to the relief of the poor; therefore, where property is altogether devoted to this purpose, it is absurd to require that a part of it should be so appropriated; persons of this description can never be considered as having that ability to provide for others, which the statute was intended to enforce.

The court held that the words of the statute, 43 Eliz. c. 2. being general, the rate for the relief of the poor is to be levied upon every occupier of lands, houses, &c. there is no exception made of any hospital or other lands devoted to charitable purposes: the only question was, whether these persons were occupiers for their own benefit—they ploughed, and sowed, and reaped, and had every sort of occupation in fact which any other person could have, and all this was for their own benefit. The smalless of the benefit could not constitute an exemption—and if it should encrease, should it be said they were not bound to contribute, because they derived that benefit from a charitable institution? Then it was said, that cases had decided that property of this kind was not rateable, because no occupier could be found; but no case has decided that where persons are found in the actual occupation,

occupation, and having a beneficial enjoyment of it, they are not within the statute. In the case of the bursar of St. Catharine Hall, he was deemed rateable, though an object of charity in one sense, being appointed to a situation in a charitable foundation. Cowp. 79.

The distinction has been truly taken, that whenever persons have been found in possession of property from which they derive a benefit to themselves, they have been held rateable as occupiers; and all the cases which have been decided against the liability, have either been upon the ground that the party was not the occupier, or if he were, that he derived no benefit to himself. But it was said that the objects themselves of a charity, though beneficial occupiers, did not come within the meaning of 43 Eliz. c. 2. the rate being for the relief of the poor; but however the persons rated might have been poor and impotent at the time when they were selected as objects of the charity, yet after their appointment to be members of the foundation, they ceased to be of that description of persons, and therefore became rateable according to the property so acquired. They were in possession of rateable property.

The object of these cases has been to find out whether the occupiers were in possession for themselves, or merely as agents for others, deriving no benefit from it themselves, as the patients of hospitals; of *Waldo's* charity, &c. These persons reaped the benefit of rateable property, and on these grounds the rate was confirmed.

Upon similar grounds, the application of the rent paid by the occupier to charitable purposes does not exempt him, although his liability must necessarily diminish the amount of the fund which is to be so applied. Thus hospital lands are rateable in the hands of a beneficial occupier, as above-mentioned. 2 Salk. 526. 1 Bot. 115. Rex v. Gardner. Cowp. 79. 1 Bot. 138. 1 Nolan, 118.

But

Rex v. Inhabitants of Aberavon, 1804. 5 East, 452.

But where a corporation was seised in fee of uninclosed lands, whereon the cattle of the resident burgesses, or of their widows, who alone were permitted to claim the right, and also of poor parishioners who from charity were permitted by the corporation to enjoy the right, the lands had been consequently always omitted from the poor-rate, in the name of the "Burgesses Land;" they produced a profit, and were not rated, but it was doubtful whether the occupation were that of the corporation or of individuals—and the rate was quashed because no person had been rated for property which ought to have been rated.

The distinction, says Mr. Nolan, with his usual discrimination, as to where charities are rateable, and where they are not so, seems to depend upon this, whether there is any body who can be rated as *occupiers*. The trustees are not rateable when they intermeddle with the property merely as trustees, because their *occupation is not beneficial*. Neither are the poor, where they are mere inmates without power or control over the premises which they inhabit, as in the case of St. Luke's and Bartholomew's hospitals, Waldo's alms-houses, and the other cases cited: for they are not occupiers. But where the objects of a charity are occupiers, as in Lord Rich's charity, or where another is a beneficial occupier for their benefit, as in those of hospital lands, the occupier is rateable, without considering the charitable purpose to which the profits are dedicated, although the rate must ultimately come from thence. Nay, where the charity is appropriated to assist the parochial poor, for whose support the rate is raised, the property seems liable to the rate if occupied, although the assessment may be nugatory in some instances, and highly improper in others.

1 Nolan, 119.

It

It is upon the equity of the decision on St. Luke's hospital, that the assessors usually levied only upon officers' apartments in all the taxes charged upon hospitals. But in the original act for levying a duty on inhabited houses, called the *house-tax*, there was a clause of exemption without this reserve; and on that ground the Small-pox hospital was relieved *in toto*, on appeal to the commissioners in 1607.

House Tax, 18 G. 3. c. 26. sec. 35. Rep. by 19 G. 3. c. 59.

But by the last act for raising the assessed taxes, the duty on windows and on inhabited houses is excepted as to any hospital, charity-school, or house provided for the reception or relief of poor persons; except such apartments therein as are occupied by the officers or servants thereof, which are made subject to the same duty, according to the number of windows contained in each, as entire dwellings and other inhabited houses: and chambers at either of the universities or inns of court are liable to the duties as separate tenements.

48 G. 3. c. 55.

The same act charges a duty on servants, and exempts the English universities, the colleges of Eton, Winchester, and Westminster, for any butler, manciple, cook, gardener, or porter: and also the royal hospitals of Christ, St. Bartholomew, Bridewell, Bethlem, and St. Thomas; and also Guy, and the Foundling.

Servants. 48 G. 3. c. 55. Sch. C. No. 2. 8.

But although this clause is not extended by name to any other house for relief of the poor, the same reasoning which was established in the case of the poor's-rate, and which most evidently produced the above exemption relating to window and house-duty, is materially applicable and conclusive here: for though the servants are hired by the house steward, they are not his servants, even though they obey his commands; they are not the servants of the individual governors, nor are they the servants of the poor persons who come into the house for

for relief; but still it is necessary that the assessor's list should be returned properly filled up, and the propriety of any subsequent appeal may be worthy of consideration.

Rex v. St. Luke's Hospital. 2 Bur. 1053. 1 Bot. 123. 1 Nolan. 110.

Servants attending an hospital, and resident there, are not such occupiers as are intended by the statute, which renders a house or property rateable.

Ayre v Smallpiece. 1 Bott 12. 1 Nolan, 111.

Where the comptroller of Chelsea hospital, or officers of that or other charitable foundations, have large distinct apartments appropriated to the use of their respective offices, where they and their families reside, they are to be charged not as servants of such hospitals, or as inhabitants and occupiers of the ordinary rooms and lodgings, but as having separate and distinct apartments, which are considered as their dwelling-houses. So the porter and butler of a college are rateable for their dwelling houses erected for them by, and belonging to the college, if they have the entire use of them, without the colleges intermeddling therewith.

Rex v. Gardner, Cowp. 81. 1 Nolan, 111.

Highways. 13 G. 3. c. 78.

As to the alteration or repair of highways, the act of 1773, which consolidated the former statutes into one, comprises public as well as private property; and as for the general good the peculiar property appropriated to any charitable purpose may be affected by some of its regulations, I shall notice in general terms only such clauses as may be necessary for the reader's more minute inspection.

Sec. 16.

Where it shall appear that any highway is not of sufficient breadth, and may be conveniently widened, or cannot be conveniently enlarged and made commodious for travellers without turning the same, any two justices of the district, upon their own view, may order the same to be widened or turned in such manner as they shall think fit, not exceeding 30 feet in breadth.

This

This power does not extend to pull down any house or building, or take away any garden, park, paddock, court, or yard; and for the satisfaction of any individual or corporation then in possession, or interested in their own right, or in trust, the surveyor, under the justice's direction, may make agreement for a proper recompense for the injury, in proportion to their interests; and if they refuse to treat or to accept the satisfaction offered by him, the justices at their quarter sessions upon a certificate, signed by the justices making the view of their proceedings therein, and upon proof of fourteen days' notice in writing by the surveyor to the party interested, of such intended application, may impannel a jury to assess the damages, which are limited to forty years' purchase, for the clear yearly value of the ground so laid out, and likewise such recompense for making new fences, and satisfaction for the injury; and on payment, or tender of the money so assessed, or leaving it in the hands of the clerk of the peace, where the proper party cannot be found, or where they refuse to accept the same, such interest shall be for ever divested out of them, and the ground be taken to be a public highway. Saving to the owners all mines, minerals, and fossils, which can be got without breaking the surface of the said highway, and all growing timber and wood to be taken by them within one month after such order, or in default thereof to be fallen by the surveyor, and laid upon the land adjoining to the owner's premises; oak trees in the months of April, May, or June, and ash, elm, or other trees, in the months of December, January, February, and March, with power to make assessment, if necessary, not exceeding 6d. in the pound of the yearly value in any one year. Sect. 13.

Power is given to the surveyor, with the approbation of the justices, to sell the land constituting the old highway, Sect. 17.

reserving

reserving any ancient right, or way, to premises adjoining thereto; the produce of the sale to be applied towards the purchase, and to vest in the purchaser, subject as aforesaid: if the jury assess more money than the sum offered by the surveyor, the costs of these proceedings are to be borne by him; if otherwise, then by the party.

Sec. 19. When it shall appear, upon the view of any two justices, that any public highway, not in the situation before described, or public bridleway, or footway, may be diverted, and the owners of the land, through which it is proposed to be made, shall consent thereto in writing, the justices at some special session may order the same, and stop up, inclose, and dispose of the old way, and purchase the ground for the new way, in such manner, and with such exceptions as are before prescribed; and the owner may, by virtue of any inquisition taken upon any writ of *ad quod damnum*, complain thereof by appeal to the quarter sessions, upon ten days' previous notice to the surveyor, if there be sufficient time for that purpose, and if not, such appeal may be made upon the like notice at the next subsequent quarter sessions, which are authorized to hear and finally determine the appeal.

These proceedings are limited to twelve months. Parties liable to the repair are continued liable to repair the new way.

Sec. 28. The surveyor is to give information upon oath to any two justices of such highways, bridges, causeways, or pavements, as are out of repair, and ought to be repaired by any persons, or corporations, by reason of any grant, tenure, limitation, or appointment of any charitable gift, or otherwise howsoever, who shall limit a time for such repair, of which notice shall be given by the surveyor to the party liable; and if the repair be not then effectually made, the justices are required to present such highway, &c.

&c. together with the party liable, at the next general quarter sessions for the district, and the session may direct the prosecution to be carried on at the general expence of the limit, or to be paid out of the general rate.

The justices of assize are authorised to make similar presentments, saving to all persons affected thereby their lawful traverse, as well with respect to the fact of non-repair, as to the duty of repairing, as they might have had upon any indictment. Sec. 24.

By the above statute certain regulations were prescribed for the repair, and the persons chargeable thereto, and how the contributions were to be recovered; but these were repealed in 1794, and a different mode directed; but in a subsequent act, passed in the year 1804, the statute duty was again directed to be performed in the manner enacted by 34 G. III. and compounded for in the manner enacted by the act of 13 G. III. viz. every person keeping a waggon, cart, wain, plough, or tumbrel, and 3 or more horses or beasts of draught used to draw the same, shall be deemed to keep a team, draught, or plough, and be liable to perform statute-duty six days in the year, if necessary, from Michaelmas to Michaelmas, and send the same with two able men, which duty so performed shall excuse every person from his duty in such parish, in respect of all lands, &c. not exceeding the annual value of 50l. which he shall occupy therein, and if he occupy therein lands of the yearly value of 50l. beyond the said yearly value of 50l. in respect whereof such team-duty shall be performed; and every person occupying lands of the yearly value of 50l. in any other parish besides that wherein he resides; and every person not keeping a team, &c. but occupying lands of 50l. in any parish, shall, in like manner, and for the same number of days, send 1 wain, cart, or carriage, furnished with not

Statute Duty, 13 G. 3. c. 78. s. 34. 34 G. 3. c. 74. s. 3. S. 4. 44 G. 3. c. 52.

less than 3 horses, or 4 oxen and 1 horse, or 2 oxen and 2 horses, and two able men to each wain, &c. and in like manner for every 50l. per annum, which he shall further occupy in any such parish; and every person who shall not keep a team, draught, or plough, but shall occupy lands under the value of 50l. in the parish where he resides, or in any other parish; and every person keeping a team, &c. and occupying lands under the yearly value of 50l. in any other parish; shall respectively contribute to the repair, and pay the surveyor, in lieu of such duty at the times mentioned in 13 Geo. III. c. 78. s. 41. viz. within ten days after notice given in the parish church, on some Sunday in November, or within one calendar month afterwards, such sums as the justices for the limits at their special session, to be held in the first week after Michaelmas quarter session, shall, by 44 G. III. c. 52. adjudge to be reasonable, not exceeding 12s. nor less than 8s. for each team, &c. per day; and in default of their adjudication, 6s. in lieu of every day's duty for each team, &c.; and for each cart with two horses, or beasts of draught, not exceeding 8s. nor less than 3s. and in default of such adjudication, 4s.; and for each cart with one horse, or beast of draught, not exceeding 6s. nor less than 2s.; and in default of such adjudication, 3s.

34 G. 3. c. 78. s. 41.

These compositions are to be recovered upon the order of two justices, at a petty session, by distress and sale.

34 G. 3. c. 74. s. 4.

It will be for the directors and stewards of houses of charity in the country, to consider how far the language of these statutes apply to them, so as to render their carriages, and themselves as occupiers, liable to the performance of the statute-duty, or to the composition in lieu thereof; the general language and tenor of the statutes, charge the liability upon persons occupying lands of certain values, with a proportionate duty and a rateable composition, but the

the implication is clear that such occupation is, in conformity with the decisions already noticed respecting other rates and taxes, solely intended to be a *beneficial occupation* and interest. These bear a very different description and interpretation from those who are placed in any house for relief of the poor to superintend its economy and management, and who receive a stipend for the exercise of the trust committed to them; as to the poor persons themselves, they are in general terms exempted by 34 G. III. c. 74. s. 5. which was not repealed by the act of 44 G. 3.; and though they are described as gaining their livelihood by daily wages, and inhabiting rateable tenements, yet the spirit of the act may be justly extended to those who are incapable of either, and dwell in any house of charity.

It may therefore be reasonably presumed, that if, for the convenience of any such house, the master were to keep a cart, it could not be taken to assist in the performance of statute-work, nor can any inhabitant of such a house be liable to compound for any proportion of the duty that should be charged upon him; how far they may be induced to conform to the notice, and to pay the composition, on account of its being very small, and in consideration of the public protection which their establishment may receive, are points for the attention of committees acting on the spot.

Indeed, where corporations have by prescriptions, or for any consideration, been accustomed to repair highways, they will remain always liable thereto, even though they may have done it out of charity, or gratuitously for any considerable time; for what it hath always done, it shall be presumed, says Mr. Hawkins, to have been always bound to. 1 Haw. 202.

But sometimes a charitable gift of lands has been formerly

7 G. 8. c. 42. s. 14. 33. merly made to trustees, or to a corporation, to repair highways; here the trustees are bound to let the lands at the most improved yearly value *without fine:* and the justices may inquire into their value, and order the employment thereof according to the will of the donor (except such lands as are given for such uses to either of the universities, which have visitors of their own:) and and in such case the surveyor's notice goes to the occupier or to the trustees. And in the case of *Harrow School*, the court did not choose to interpose, though the trustees had laid out the money in repairing a different part of that road, not exactly pursuant to the will; but then they were invested with very extensive discretionary powers; and it did not appear they had acted corruptly: but the court would not dismiss the information.

2 Vezey, 551.

43 G. 3. c. 122. In the statute of 1803, for levying duty on property, the revenues and income of lands and funds of charitable institutions were exempted.

Property.

This act was repealed by 46 Geo. III. c. 65. 1806, under which statute those exemptions are stated as follow after sec. 74, in schedule A. No. 6.

"For the duties charged on any college or hall in any of he universities in Great Britain, in respect of the public buildings and offices belonging thereto, and not occupied by any individual member or members thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall, and the gardens, walks, and grounds for recreation, repaired and maintained by the funds of such college or hall.

"Or on any hospital, public school, or alms-house, in respect of the public buildings, offices, and premises belonging to such hospital, public school, or alms-house, and not occupied by any individual officer, or the master thereof, whose profits or emoluments, however arising, shall exceed

exceed 50l. per annum, or by any person paying rent for the same, and for the repairs of such hospital, public school, or alms-house, and offices belonging thereto, and of the gardens, walks, and grounds, for the sustenance or recreation of the hospitallers, scholars, and alms-men, repaired and maintained by the funds of such hospital, school, or alms-house.

"Or on the rents and profits of messuages, lands, tenements, or hereditaments belonging to any hospital, public school, or alms-house, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes.

"The said allowances to be granted on proof before the commissioners for special purposes, of the due application of the rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only; to be claimed and proved by any steward, agent, or factor, acting for such school, hospital, or alms-house, or other trust for charitable purposes, or by any trustee of the same, by affidavit to be taken before any commissioner in the district, where such person shall reside, stating the amount of the duties chargeable, and the application thereof, and to be carried into effect by the said commissioners for special purposes, and according to the powers vested in them, without vacating, altering, or impeaching the assessment made in respect of such properties, which assessment shall be in force and levied notwithstanding such allowances."

As soon as the trustee or agent for the charity has paid this assessment, it is necessary for him to address a letter to the special commissioners, stating the amount and soliciting the return; he will in a short time afterwards receive a printed affidavit, filled up at their office conformably with his return, stating that the premises in question are wholly occupied for the purposes of

the charity, noticing the resident officer's apartments. This affidavit must then be signed and sworn before a commissioner acting for his district, for which no fee is demanded; and when it has been transmitted to the special commissioners, a certificate will be returned for re-payment of the duty at the office of the receiver-general of the county.

The exemptions from the duty on personal property are stated after sec. 103, schedule C.

"1. The stock or dividends of any friendly society, established under the statute of 33 G.III. c. 54. provided the property therein shall be duly proved in the manner above prescribed.

"2. The stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only; or which, according to the rules or regulations established by act of parliament, charter, decree, deed of trust or will, shall be applicable by them to charitable purposes only, and in so far as the same shall be applied to charitable purposes only; or the stock or dividends in the names of any trustees applicable to the repairs of any cathedral, college, church, or chapel, and to no other purpose, and in so far as the same shall be applied to such purposes, provided the application thereof to such purposes shall be proved in like manner."

When the trustee has received the net dividend, it is necessary to address a letter to the special commissioners, at their office in Somerset-place, stating the names in the joint account, the stock, and the dividend, and soliciting a return of the duty retained; they will then transmit an affidavit, filled up at their office, according to his letter, and stating that the property is wholly applied to the use of the charity; which must be signed and sworn by him before any one commissioner of the district where

where he resides, for which no fee is demanded; this must then be returned to the special commissioners, who will in a short time afterwards remit to him a certificate for the repayment of the duty by the bank of England. Having occasion at every quarter of the year to make this application, I cannot forbear my humble testimony to the facility with which this arrangement is conducted, so as to create neither trouble to the parties, nor unnecessary delay in the payment.

Binding.

The statute of Queen Ann, relative to the binding of parish apprentices, exempts the master from the payment of the duty charged on the fee, where he is placed out at the expence of any "parish or township, or public charity."

8 Ann. c. 9. s. 40.
A. D. 1709
Rex v. St. Petrox.
4 T. Rep. 196.
1 Bot. 556.

These words are said to comprehend not only parish apprentices formerly bound out by parish officers with the assent of two justices, but voluntary apprentices also, provided the fee be taken from the public parish or charity fund. But the words of 44 Geo. III. c. 98. differ somewhat from the above.

The court has given a liberal construction to the words "public charity," and held that it need not be a *permanent* charity.

In the parish of St. John, Wapping, there was a voluntary annual subscription by divers inhabitants for putting out apprentices, boys and girls brought up at the parish charity school. Four trustees and a treasurer were annually elected to manage the charity, and a number of children were annually bound out. This was held a *public charity* and within the proviso. A boy therefore bound by indenture, whose master received 5l. from the trustees of this charity, gained a settlement, although not stamped with a stamp denoting the receipt of this duty. For Lord *Mansfield* held this to be a public charity, and that it was not necessary that it should be a

Rex v. St. Matthew, Bethnal-green.
Burr. S. C. 574.
1 Bot. 643.
1 Nolan. 402.

permanent charity. The reason of the distinction between a public and a private charity is obvious; a private charity may be calculated to evade the act, which a public one cannot be supposed to be. Neither is the extent of the fund, or the number of its objects material. The criterion of a public charity within this act appears to be, that the object of the charity should be general, without having any particular individual in contemplation at the time it is created, as otherwise the duty might be easily evaded. A bequest to a parish of a sum to be given as a trustee thinks fit, "some of it to put out children apprentices," upon the binding of several the indentures expressed the fee, and that it was charity-money, and there was no stamp-duty thereon. The court of quarter session found that it was a public charity, and that the legacy (which was charged on land) was not paid for eight years after the will was proved, and on that account 70l. was paid. It was argued that this was not a public but a private charity, being left entirely to the choice of the trustee, whether to put out children apprentice with this money or not. But the court held it a *public charity*, and that the pauper gained a settlement.

Rex. v. Clifton. Burr. S. C. 697. 1 Bot. 645. 1 Nolan. 403.

All the ward and parochial schools, Christ's hospital, and many other foundations under the administration of companies, parish overseers, &c. are vested with legacies, trusts, and benefactions, and some landed endowments for the purpose of giving apprentice-fees, and binding out poor children to trades, manufactures, and arts, which have been productive of the safety and protection of the rising generation from vicious courses, when the period of their maturity should arrive, and they should become thereby emancipated from control; and the legislature hath wisely borne its testimony to such salutary establishments, by relieving them from any contribution to the public revenue.

CHAP.

CHAP. IV.

OF EVIDENCE.

In addition to the obvious rule as well at law as in equity, that to preserve the purity of evidence, the witness must be disinterested both as to the question and as to the property, it may be proper to premise, that a man who is interested in the event of a suit, is objectionable only where he comes to prove a fact consistent with his interest; for if the evidence which he is to give be contrary to his interest, he is the best possible witness that can be called, and no objection can be made to him by either party in the cause. Peake on Evidence, 1. 108.

It is not a general rule that members of a corporation or society shall be admitted or refused; every case must stand on its own circumstances; thus any person of a county, if he is not within the hundred where the question is, may be a witness. 2 Lev. 231. 1 Sid. 192.

The old cases at law have gone upon very subtle grounds; but of late years the courts have endeavoured, as far as possible, consistent with authorities, to let the objection go to the credit rather than to the competency of a witness; and the general rule now established is, that no objection can be made to a witness on this ground, unless he be directly interested; that is, unless he may be immediately benefited or injured by the event of the suit. These are the principles which govern the rules of evidence at common law, and attach an equal weight 1 Peake, 93. 1 T. Rep. 300.

testator's intention, no man living can be sure of that, and I do much doubt it; for why may not a man mean at the same time to give it to the poor, and likewise ease the parish? The poor's rate is a most heavy burden; it falls upon the tenant, and occupier, and is paid by those who are not above a degree or two richer than the object he is forced to relieve; so that he who so disposes of his estate is a double benefactor.

But be this as it will, if a gift is made to the parochial poor, it must reduce the rate *ex necessitate*, though the testator may possibly intend otherwise.

My brother Gould contends in the next place, with whom my two other brothers now concur, That this benefaction should not be considered as an estate to the parish, but as a bounty to be added to the parish relief, for the comfort of the poor, and not for their subsistence.

By the 43 Eliz. the parish are only taxable for the necessary relief of the poor; nothing therefore but necessity can call for this relief. If the party can subsist by any means whatsoever without this aid, he is not the object of this law; nor can it ever be material to consider from whence the pauper is supplied; if he has wherewithal to subsist without the parish, the parish must be discharged, because the relief in such case is not necessary: and as the necessity of the object is the rule by which the relief is to be proportioned, it must be more or less according to the pauper's condition and circumstances.

If a labourer who earns seven shillings a week by his industry, is incumbered with a large impotent family, the parish adds so much to his weekly gains, and no more than will be just enough to keep the family alive; if he falls sick, the allowance is increased; if his children die, or become useful, it is diminished: one has a little close

close worth 40s. a year; his stipend will be less than his neighbour's, who has but 2s. a year; and he again will be less considered than another who has nothing. This is the true reason why the rate is directed to be made weekly, or otherwise, because the state of the poor is always fluctuating.

An estate or legacy is given to the poor; if in this case the rate must continue the same without any regard to the benefaction, you call upon the parish for a superfluity: for as far as the rate added to the charity will exceed the sum necessary for their subsistence, the parish is taxed just so far beyond the sum necessary for their relief; and so contrary to the act of parliament; for relief and subsistence are synonimous terms.

This duty upon the parish is so connected with the necessity of the pauper, that if a testator bequeathing a legacy to the poor should say, "I mean that the poor "shall enjoy the same parish allowance, over and above "my legacy," the clause would be *felo de se* and void; unless it can be maintained that he who has something is as poor as when he hath nothing. For if he is richer, he wants less relief; and if less relief, a lower rate will do; so that if the legacy takes place, the parish must of necessity be eased.

I have been arguing upon an allowance of money:—Suppose a testator bequeathes a legacy to clothe the poor, or a house to receive them, or a sum to prentice out children—must the parish clothe, lodge, and bind out as they did before? Or must they add the value of the clothing, house, &c. to the former allowance, and so give the poor a superfluity above their necessary subsistence? I think that cannot be contended: and yet a gift of a house, or clothing, is as much a bounty to this purpose as a gift of money.

If

If I suppose in arguing, which I have a right to do, that the charity is amply sufficient to maintain all the poor, Gould, J. does not own, nor does he choose to deny, that the parish, in this case, must be eased; but if it is only a trifle, it is a bounty. According to what I have said, let it be ever so small, it must operate *pro tanto*.

Nor can there be any difference between a devise to trustees, and a devise to overseers: the trust is the same in both, and the objects the same; and the parish officers are but trustees: as the trustees in the application of the charity are parish officers, the hands through which the charity passeth, are, in both cases, mere instruments.

As often as this question has come before the court, in the cases of penalties given by parliament to the poor of the parish, the court has constantly held, that the rate would be reduced by those sums, and every parishioner eased *pro tanto*: yet those are gifts, why not bounties, in many cases more inconsiderable than the present; upon the whole this idea of a bounty is nouvelle at the bench.

1 P. Wms. 600. Atty-gen. v. Wybourg. Reported very shortly. See 4 T. Rep. 17.

Charity was given by will to clothe six poor persons of Enfield, in Middlesex:

Lord-chancellor Macclesfield would not suffer any of the inhabitants of that parish to be witnesses, because they were interested as being eased in the poor's rate; and though it was urged, that they might be lodgers there, or persons not contributing to the rate, and that it was incumbent on those who took the exception to make out the contrary; yet the court said, the witness being described to be "of the parish of Enfield, yeoman," must be intended an house-keeper, and one liable to pay parish-rates, unless the contrary be made appear.

But

But his lordship went further into the subject than is reported in 1 P. W. and argued as follows:

What can be said on the last use of this will, to bind out poor children apprentices? Here the parish must be eased, unless they will choose to pay the master double the value. To proceed to the remaining difficulties:

The interest is nothing claimed under the will; it is nothing in present, it is contingent in future; it is minute.

To the first; it is not given to the parishioners, but it is an interest derived to the parishioner, in consequence of the will; the common case of penalties given to the poor; he gains if the will is established; he loses, if it is set aside.

To the next, it is no easement, *in presenti*, I admit; but in respect of future easement, it is even now a present, and a lasting benefit; and in truth, which will answer the next objection at the same time, all future interests, where certain or contingent, whether now or hereafter to be enjoyed, are present benefits, have a price, and are saleable.

The court of Chancery, therefore, have very sensibly pronounced possibilities, to be vested interests, and made them transmissible; a fee expectant upon a thousand years' term has been sold for money: let me put the case of an executory devise of an estate of 10,000l. a year, and the life before in a deep consumption; I am entitled to put the strongest case I please; could this devisee be a competent witness to prove the will? The answer must be, he could not; tell me then, what chances are valuable, and what not; till this line is drawn, I must insist, that all chances are valuable.

Hence if it should be said, that perhaps the parish may

may have no poor; I admit the supposition to be possible, and barely so; but if it be only as possible that they may be burdened with poor, every estate that is discharged from this possible burden, is in that respect bettered, and must remain so, as long as the statute of 43 Eliz. stands unrepealed.

As to the objection, that the interest is too minute; and that a small interest, as in *Townsend's case*, ought not to disqualify witnesses:—I do conceive that however that point may have been litigated formerly, yet that now the law is clearly settled, and the witness must be rejected if he has any interest, be it ever so small.

The point was disputed for above 20 years, in the case of toll, or custom, claimed by the city of London upon importation, called by the name of *Water Bailage*.

The question was, whether freemen might be witnesses? Nothing can be more minute than such an interest; and yet after many opinions, *pro* and *con*. it was finally settled that they were not witnesses. Any person who has a desire to trace the history of this question, may find it in 2 Keb. 295. 3 Keb. 2 Len. 231. 2 Show, 47, 146. 1 Vent. 351. Vern. 254, 318. 11 Mod. 225. 1 Vern. 254.—Stat. 1 Ann, c. 10. is material for this purpose; for that act lets in the evidence of the inhabitants of counties, &c. in all informations and indictments for not repairing highways and bridges. So again, the parishioner is admitted for suits to recover money misspent by parish officers. Which shew, that the rule to reject witnesses for minute interest, could not be broken in upon by less authority than an act of parliament.

Viner, Cha. anno 1737.

An inhabitant receiving alms is no witness.

True it is that the interest of the witnesses in some

cases

cases is drawn so fine, that it is scarce perceptible, and yet that glimmering, that scintilla, shall be as powerful to exclude the witness, as the most substantial profit; and I have always understood that case to be good law, where the court set aside the witness, because he thought himself bound in honour to pay the costs of the suit.

The true ground whereof is this, which is fit to be attended to in every part of this branch of the argument, that as no positive law is able to define *that quantity* of interest, which shall have no influence upon the minds of men, it is better to have the rule inflexible, than permit it to be bent by the discretion of the judge.

The discretion of the judge is the law of tyrants; it is *always* unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion; in the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable!

As to the point, how far this interest is releasable; It is neither so within the intention of the act, nor in its own nature.

1. Interest releasable must be something out of the testator's estate; which this is not.

2. It must be given to the witness by the testator; which this is not.

Therefore is not the subject which meddles with bequests made by testator of his own estate to his own legatees.

Lastly, not a releasable thing in its own nature: It is an easement, an *onus* extinguished.

If it is to exist, it must be revived: the release will do that; nothing but rights can be released.

How shall this be drawn, and who shall be the relessee? Devisee, or heir-at-law, or parish officers? Does

it pass any thing? No: does it operate any thing? No: absurdity!

If it be said, it may be renounced, and that is the same thing; I answer, the act has used the word *release*. And yet I do not well see, how a man can renounce the discharge of a burden; if he who is intitled to the profit of it will not claim it, or enjoy it. I see no other way of restoring such a tax to the parish, but by a new grant.

The case was sent to the master, to inquire whether the lands were liable to the charity.

It is the practice in all causes, where a corporation is a party, to disfranchise a free member before he can be admitted to give evidence:—But as the governor of a charity comes in by virtue of his donation, or as executor to some donor deceased, and will be deemed as much interested for the good of his charity, as a free brother can be for his own company or city; and as he can never be divested therefrom, but by his receiving back his donation, which all the governors together have not power to order, for they are accountable to the public, and cannot as was said before make themselves founders; there is no method of rendering a governor's evidence in behalf of his own charity admissible, if excepted to.

I mean this as a mere caution, for the members of a charity are in general its benefactors, and reap no benefit to themselves, they are therefore disinterested in supporting it, unless any circumstances can shew them to be interested by receiving any part of its emoluments to their own use, as the fellows of a college, who divide its surplus revenue; any such persons, in attesting wills containing donations to their charity, if such donation should afterwards come into litigation, could not strictly be competent evidence to prove the will in favour of the charity.

The

The statute of frauds having directed that all devises and bequests of lands and tenements deviseable shall be in writing, signed by the party, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in his presence, by three or four credible witnesses, or else shall be utterly void. Considerable doubts arose who were to be deemed legal witnesses within the meaning of that act; and therefore a declaratory statute passed for that purpose in 1752, which makes void any *beneficial* devise, legacy, estate, interest, gift, or appointment of, or affecting real and personal estate (other than charges on lands for payment of debts) to any attesting witness, so far only as concerns *himself*, or any person claiming under him; so that such witness may be admitted as evidence to prove the will.—Sec. 1. 29 Car. 2. c. 3. s. 5. 25 G. 2. c. 6.

The word beneficial is clearly intended to define the nature of the devise or bequest to be for his own benefit; and if it be not so, I should conceive him to be good evidence. But a creditor attesting, whose debt the testator has charged on his lands, may be admitted as evidence—Sec. 2.; as also those who shall have received or refused their legacy.—Sec. 3.

No such legatee, or who shall have refused to receive his legacy on tender made, and shall have been examined as a witness concerning the execution of such will or codicil, shall afterwards demand or take possession of, or receive any profits, or benefit, from the estate, &c. devised; or demand, receive, or accept from any persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever.—Sec. 7.

By the language of this act it will appear, that although the statute of frauds was in this respect con-

fined to real estates, which according to the last statute of mortmain cannot be devised for charitable purposes, yet the provisions here made relative to witnesses, are extended to bequests of personal estate, and are therefore well worthy the attention of those who are concerned in maintaining them.

The credit of every such attesting witness, and all circumstances relative thereto, are subject to the consideration and determination of the court and jury before whom, or of the court of equity wherein he may be examined, or his testimony made use of, in such manner as the credit of witnesses in all other cases ought to be considered of and determined.—Sec. 6.

These provisions are extended to the British colonies, where the statute of frauds is received.—Sec. 10.

29 C 2. c. 3. s. 19. The statute of frauds also enacts, that no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of 30l. that is not proved by the oaths of three witnesses at least, who were present at the making thereof; nor unless it be proved that the testator did then bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such will were made in his last sickness, and in the house of his habitation or dwelling, or where he had been resident ten days or more next before the making such will, except where he was surprised or taken sick, being from his own home, and died before he returned to his dwelling. And after six months passed after the speaking of the pretended testamentary words, no testimony can be received to prove any will nuncupative, except the testimony, or the substance thereof were committed to writing within six days after making the will.—Sec. 20.

No will in writing of personal estate is repealed, nor any

any devise or bequest therein altered or changed by any words, or will by word of mouth only, except it be in the life-time of the testator committed to writing, and after the writing thereof read to him, and allowed by him, and proved to be so done by three witnesses at least.—Sec. 22. Raym 334.

Soldiers' and mariners' wills excepted during actual service.—Sec. 23.

And all such witnesses as are and ought to be allowed to be good witnesses upon any trial at law, by the laws and customs of the realm, are good witnesses to prove any nuncupative will, or any thing relating thereto. 4 Ann, c. 16. s. 14. A. D. 1705.

It would be deemed unnecessarily extending this work to review the cases which have occurred relative to the attestation of wills, the practice of which is now sufficiently settled and understood; it may, however, be not unappropriate to add, that although the common way is to call but one witness to prove a will, yet that is only where there is no objection made by the heir; for he is entitled to have them all examined—but then he must produce them, for the devisee need produce only one, if that one prove all the requisites; and though they should all swear that the will was not duly executed, yet the devisee would be permitted to go into circumstances to prove the due execution, as in *Austin* v. *Willes*, cited by Lord *Hardwicke* in *Blacket* v. *Widdrington*.—11 G. 2. See Buller, N. Pr. 263. Str. 1096, 1026.

I cite this from the high authority of the late Mr. Justice *Buller*, as a matter of considerable moment in cases of charity, where the heir-at-law or next of kin are generally parties to suits instituted in order to establish or oppose devises to charitable uses.

A will not attested by any witnesses does not operate as an appointment for a charity, by 43 Eliz. c. 4. Atty. v. Baines, 1708. Prec. Ch. 270.

Ante. 106. 8 Atk. 131.

It was settled in *Adlington* v. *Cann*, that the same ceremonies are required by the statute of frauds to dispose of a trust or equitable interest in freehold lands, as of a legal estate in such lands; nor can a testator revoke a trust any more than he can devise it, without those ceremonies. And every will to pass lands by virtue of a power, must be executed according to that statute.

2 Ves. 76.

But it is not absolutely necessary, under that statute, that the testator should sign his name in the presence of the witnesses, though it is actually done so, and is certainly far preferable to be done so; acknowledging his hand to them is sufficient, though at different times.

Grayson v. Atkinson. 2 Ves. 454. Ante. 186.

Although a testator may have charged his real estate with debts in aid of the personal, yet the personal may be given, exempt from the debts, by an unattested codicil.

Coxe v. Basset. 3 Ves. jun. 155. Ante. 281.

Where the real estate was well charged in aid of the personal with legacies, even if the charge was not general, so as to include future legacies, a legacy may be revoked and given to another by an unattested codicil.

Atty. v. Ward. 3 Ves. jun. 327.

The provisions of the statute of frauds are of such importance, that Lord *Eldon* was of opinion that it would be expedient to apply them to wills of personal estate—in which charity cases are more especially involved.

Beauchamp v. Earl of Hardwicke, 1800. 3 Ves. jun. 256.

CHAP.

CHAPTER V.

OF CHARITABLE LOANS AT INTEREST; AND OF INTEREST WHEN CHARGEABLE.

SECT. I.

Of Loans at Interest.

PUFFENDORF deems it unbecoming to accept interest for a small sum from those to whom it is in a manner charity to relieve; and he adds, that the Greeks took an excellent method to support their friends in distress; for several entered into a society, and had a common chest, to which each contributed a certain sum every month; and out of this they lent money without interest to any of the society that should happen to be reduced to necessity; upon condition to refund it, if his circumstances should ever amend: this contribution money was called ἔρανος. Puff. de Jure Nat. et Gent. lib. 5, cap. 7. s. 1.

Subsequent times looked with less jealousy upon usury at Rome, where public morals were superior to those in Greece. Simple interest was there exacted monthly, in order that its effect might be augmented; and this was settled anno 356, ante J. C. at one per cent. per month; but in ten years afterwards it was reduced to one-half per cent. allowing the debtor, upon payment of one-fourth of the debt, three years to discharge the remainder by annual and equal payments. Ibid. s. 12. 8 Smith's W. Na. 173. Arburthnot on coins, c. 22. Liv. l. 7. c. 27. 1 Hooke, 503.

Abstracted from our modern regulations for the reduction of interest, this plan must have contributed greatly to the assistance and encouragement of young tradesmen and others; and in consequence of its utility, in a moderate degree, the popes themselves permitted it, under

the specious title of *montes pietatis*; the rules of which were, that three *scutati** were lent to any poor man, without pledge or interest; but for larger sums, pledges were taken, and a small payment made every month: where the pledge was not redeemed within the year, it was subject to sale, and so much of the proceeds as exceeded the debt was restored to the owner. Alexander Severus not only lent money, according to *Lampridius*, publicly at 4 per cent. but also advanced it to many poor people, without interest, to enable them to improve their lands, waiting for the repayment out of the produce. A similar practice prevailed in Lombardy, except that nothing was advanced without a pledge.

2 Sp. Laws, b. 22. c. 19.

The utility of such a measure is obvious. "Specie, (says Montesquieu), is the sign of value; he who has occasion for this sign ought to pay for the use of it, as well as for every thing else he has occasion for; all the dif-

* The Latin golden *scutatus*, the Italian *scudo*, and the French *ecu*, all agree in the same derivation from the *scutum* or shield originally impressed on the French crowns of the middle ages. Its value varied under almost every reign of the sovereigns of France and Germany; but if Gronovius may be relied on, the scutatus was equal to three sestertii and one as. A *sestertius* was equal to twelve farthings, or three-pence of our money, to which if one *as* be added, it will produce one hundred pence. A scutatus, therefore, was equal to eight shillings and four-pence English; so that a loan of three scutati was equal to twenty-five shillings, a proper sum to be lent without pledge or interest.

Gronovius de pecuniâ vet. lib. 3. 119, 175.

12 Gibbon, 282. 2 Muratori, 559.

The first Cæsars had been invested with the exclusive coinage of gold and silver, and it is believed that they abandoned to the senate that of the baser metals of bronze or copper. The successors of Dioclesian assumed the sole direction of the mint; and after a lapse of 800 years, the senate asserted this lucrative privilege, which the popes had tacitly renounced from Paschal II. to the establishment of their residence beyond the Alps, where it was resumed in the court of Avignon by Benedict XI. Some of these coins are shewn in the cabinets of the curious, bearing the name and arms of the family impressed on a *shield*; from whence I conceive they took their name, and probably bore an indefinite value according to their size and workmanship.

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ference is, that other things may be either hired or bought, whilst money, which is the price of things, can only be hired and not bought;" and however useful it may be to men engaged in trade, it is peculiarly so at small interest, to enable poor persons to raise and establish themselves above their level of poverty, and to give them an energy to pursue some industrious manufacture or calling for their *own account*. Many a young tradesman, at his first setting up in business, and many a respectable manufacturer, who, for want of such assistance, is incapable of emerging from depression, might be thus fixed on a firm foundation for success, which would probably, if attended with prudent management, secure a permanent prosperity for himself and his family. From such a source the wealth of nations may be readily computed, for it tends to prevent the depression of the major part of the people; and the natural effort of every individual to amend his condition, will, if unrestrained, result in general prosperity. Societies of this kind, by making small advances at a time, and increasing them after the repayment of every loan, upon a renewed application, and taking sufficient securities to prevent the imposition of designing persons, whether managers or borrowers of the funds, would be productive of unspeakable benefit at this juncture.

2 Smith, W. Na. 319.

If trustees grossly misapply the charity-funds, and are unable to replace them, the court will dispossess them of their trust, and order them to convey the estates or property to other trustees, for the benefit of the charitable uses in question.

7 Br. P. C. 235. Coventry v. Atty. 1720.

In the year 1730, a "charitable corporation for the relief of the industrious poor, by assisting them with small sums upon pledges at legal interest," very similar to the *montes pietatis* already mentioned, was established; but the whole plan

plan was converted only to an iniquitous method of enriching particular persons who had secured the management of it in their own hands, to the ruin of such numbers, that it became a parliamentary concern to obtain relief for the unfortunate sufferers. Three of the managers were expelled and brought to account with their creditors: the banker and agent of the corporation absconded from the kingdom, charged with a considerable debt to the company, and with having been concerned in many fraudulent and indirect practices, and was declared a bankrupt. The warehouse-keeper of the company also absconded, and carried with him the books and papers, being considerably indebted to the corporation, and having likewise been guilty of similar conduct; a time was limitted for their surrender, during which they were protected from arrests, after which they were declared guilty of felony, &c.

5 G. 2. c. 8. 1732. 1 Eden, 290. Appx. cclix.

Commissioners were appointed to state and determine the claims of the creditors of the corporation, and of all persons claiming any interest in its funds, to appoint an assignee to those bankruptcies, and to give power to their commissioners to proceed and apply their effects, in as short a manner, and with as little expence as possible. Their authority continued six months; all claims not entered within that time were declared void; effects to be delivered to new assignees, and the surplus of the respective estates to go to the corporation; and the commissioners to deliver accounts to parliament.

5 G. 2. c. 31.

The whole sum for which the corporation was answerable amounted to 487,895l. 14s. 10¾d. and there remained no more in money or effects than 34,150l. 13s. 1½d. so that the net loss was 453,745l. 1s. 9¼d. except what might be recovered from persons indebted to the corporation, of which no estimate was then made; it was declared

6 G. 2, c. 35. 1733.

clared by parliament to be a reasonable act of charity to give relief and satisfaction to such of the sufferers as should appear, upon examination, to be objects of compassion. Commissioners were therefore appointed for twelve months, 500,000l. was ordered to be raised by lottery, at 4l. per ticket, 4-5ths of which sum was to be repaid, and 1-5th reserved for their relief, &c.; and five masters in chancery were appointed to hear and determine the claims. The committee of the corporation were excepted from relief except three members. These claims amounted to 160,950l. 18s. 10¾d. The 500,000l. was contributed upon the credit of the act, and paid into the bank; and after deducting 4-5ths for the fortunate tickets, and also all expences, there remained 79,120l. 4s. 5d. to be divided among the sufferers. These payments and regulations were authorised by a fresh act. 7 G. 2. c. 11. 1734.

In the following year, 1734, the fortunate tickets, not then claimed, amounted to 2720l.

A small sum was saved and invested in the funds, which has considerably accumulated under the direction of a few remaining members and their present representatives.

It must be confessed that this melancholy history of human depravity affords but a slender encouragement to the revival of such a plan in this country; but the sentiments heretofore expressed in favour of charitable loans at interest are not thereby diminished, for the principle is not to be rejected because the institution happened to fall into corrupt hands; and probably the subsequent increase of vigilance, arising from the increasing pressure for money, and from a more enlarged and extensive knowledge of business of all kinds, might obviate the probability of a similar record of iniquity. But it is fair to suggest that every liberal mind may form his own society, and grant encouragement to his own object: of this I have known several instances; where a few pounds lent

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in season, at a small interest, have been productive of all the good that may be devised; the payment of interest affords a stimulus to industry and attention to business, in order to discharge the obligation; and it is at all times in the option of the lender to return the interest: this is one among the manifold ways in which the opulent and humane carry on the work of their own prosperity in this splendid and prosperous capital, where, if much is gained, much is liberally given!

Duke, 141. It was formerly held unsafe to bequeath money to be put out at interest, and the interest to be given to the poor; for this was not deemed a charitable use, because it depended on usury, which is unlawful. But at present, there being no restraint in the late act, to render a bequest void, that directs a sum to be laid out in the funds for the benefit of a charity, it seems that the former principle is altered; for this, though a security for money, yet is not a real security, which has been decided to come within the meaning and spirit of the statute; and the following case may serve as a full explanation of this rule.

2 Ves. 547.

Atty. Gen. v. Corporation of Stafford. Barn. Ca. Cha. 33. 1740. In the town of *Stafford* various sums had been given to the corporation to be lent out to the poorer sort of the inhabitants at 5l. or 10l. at a time; some at full interest, some at half interest, and some without interest. The whole sum lent out was 590l. The corporation fearing they might lose it by pursuing this method, thought proper, in 1714, to call in as much as they could, and then there was a deficiency of 140l. the rest continued in their hands for some years. To make up the whole sum of 590l. they were advised to put out what they had gathered in to good security, till the interest should have accumulated it to that amount (which was made up in 1725), and then, in order that the poor inhabitants should reap the benefit, they were advised to lend the whole on good security, and divide the interest among the poor inhabitants,

bitants, as they should think proper; they followed this method, and distributed 21l. part of the interest, among 42 of the poor inhabitants, at 10s. per head. Under a commission for charitable uses, they were compelled to lend out the whole again in small parts, agreeable to the bequest, and the corporation to pay the costs of the commission; they took exceptions to this decree, which were never argued, they agreeing to pay the prosecutor out of the 590l. in their hands, 90l. for his costs, and so he consented that the decree should be reversed.

The present information was filed, praying for interest as long as the money remained in the hands of the corporation, and to have other trustees appointed.

The following was the substance of Lord-chancellor Hardwicke's decree. That some part of the money was to be lent without interest, other parts with half interest, and other parts at full interest. The first of these is a good charity, in that it is a means of encouragement to set the poor on work; the second of these is good in proportion; but how it is a charity to lend money to the poor at full interest, he could not find. At first the corporation complied with the trusts. And considering the money was to be lent to the poor in such small sums, it is no wonder there was a loss; and if the whole had been lost in that way, the corporation would not have been answerable. As to the method they took to make up the deficiency, he did not know that a better method could be taken. But from the time they made up the whole, they kept the money in their own hands, and therefore it is prayed that they may account for it with interest; with this interest they ought to be chargeable: and there is no ground to stop the interest at the time of putting in their answer, though they thereby declare, that they are willing to account for it, as the court shall direct.

direct. That interest now must be added to the principal, to increase the sum that is to be lent out to the poor inhabitants. The corporation claim an allowance of the 21l. distributed at 10s. per head; this advice was far from being proper. The intention of these charities was to assist the industrious poor, by lending them money to go on with their callings. But the giving them such small sums as 10s. a piece, was an encouragement to make them idle; however, as this money has been disposed of among the poor, and as it was only a mistake of judgment in the corporation, they must have an allowance for it. But for the future this method of putting out this money to strangers, upon good security, and distributing the interest among the poor, must not be continued. The 90l. paid to the prosecutor for his costs, upon his consenting that the decree should be reversed, must not be allowed.

This was a commission that there was a foundation for; it was to compel the corporation to lend out this money in small sums to the poor, according to the directions of the charities. The commissioners decreed that the money should be lent out in that manner. They ordered indeed that the corporation should pay the costs of this commission; and that perhaps was more than they could justify. Exceptions were taken to this decree, but instead of arguing them, the corporation and prosecutor came to an agreement, that the prosecutor should have this 90l. for his costs, and that the decree should be reversed: this was certainly wrong, both in the corporation and the prosecutor. There is no instance of costs in these cases being directed to be paid out of the charity-money, unless where the bill is brought to establish a charity. He did not think the circumstances strong enough to take the money out of the hands of the corporation,

corporation, and to place it in other trustees; nor was he inclined to take the money into the court. But the circumstances are strong enough, to direct that the corporation shall pay the costs of this suit. The information was made necessary by what they did. The disposal of the 90l. was a gross misbehaviour; nor have they lent any part of the 590l. to the purposes for which the charity was given ever since the year 1725. And decreed accordingly.

SECT. II.

Of Interest when chargeable.

If it is quite uncertain from the words of a will, whether the testator intended that the capital or the interest, or produce of it, should pass; the court will not confine it to the interest, or produce. 2 Atk. 328.

If the executors of a charitable bequest jointly concern themselves in the estate, and one of them misemploys the bequest, and dies; the survivor is liable for the whole; but if he did not act, it is otherwise. If they detain money in their hands, bequeathed to charitable uses, they are liable to damages, which will be the interest due for the time; this is now fixed by the court at 4l. per cent. Duke, 67.

And it has been held that such interest commences, in all charity legacies, from the testator's death: though this must be understood where the testator himself made no limitation of time for payment of the legacy; and whether the legacy be in suit or no, still the same interest accrues. But it is now the established practice for interest to be chargeable on all legacies from one year next after the testator's death, unless otherwise directed thereby. 1 Atk. 356. Att. v. Hayes, 1736.

CHAP.

CHAP. VI.

OF NUISANCE.

THE establishment of hospitals for the sick in different neighbourhoods, and even the establishment of a neighbourhood in the vicinity of any hospital, has not unfrequently suggested the question, whether hospitals were nuisances? Common nuisances are a species of offence or of injury against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. Nuisance, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage, and the common law gives a very summary remedy by abatement or removal of it. Common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person: and therefore are indictable only, and not actionable; as it would be unreasonable to multiply *suits* by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects.

4 Bl. Com. 166.
1 Haw. P. C. c. 75.
2 Rol. Abr. 88.
3 Bl. Com. 216.
Ibid. 5.
1 Haw. P. C. c. 75.
4 Bl. Com. 166.

How far the election of an hospital in a populous neighbourhood can be indictable as a nuisance, is a question easily answered by the fact of many hospitals for the sick, and for even contagious disorders, in the centre and in the vicinity of the metropolis of London, without any evil consequences having been ever known to arise from them; the precaution taken in the management of them, and

and their being every-where separated from the immediate line of public passage-way, at a distance too great for any exhalations to be felt, contribute to reduce the idea of a nuisance to a bare apprehension; and to show how far they are removed from any of the definitions above-mentioned: for fear, however reasonable, will not create a nuisance. 3 Atk. 21, 726, 750.

But this question was urged upon the court with peculiar force at the time of the proposed establishment of an hospital to relieve one of the severest and most contagious of human afflictions in the year 1752. The original founders of the hospital for the small-pox purchased the lease of the house and gardens, thentofore occupied as a place of diversion and refreshment, and known by the sign of Sir John Oldcastle, in Cold-bath Fields. They were proceeding to convert the premises to the purposes designed, when a bill of injunction was filed against them to stay the building of such an hospital, it being very near the houses of several tenants of the plaintiff. The infectiousness of the distemper, and the terror it occasioned in the neighbourhood, were insisted on: also that the lessee for years, under whom the defendants claim, held the estate of the plaintiff; and in the lease was an express covenant against the house being turned to a brewhouse, which would annoy the neighbourhood. It was said that an affidavit was filed, shewing that several tenants of the plaintiff had given him notice to quit; but the lord-chancellor did not suffer it to be read, but took it up on hearing the counsel for the motion. 1752. Baines v. Baker. Amb. 158.

2 Roll. Abr. 139, 140; 1 Lut. 69; Haw. P. C. ch. 75. s. 11. were cited: where it was held to be a common nuisance to divide a house in a town for poor people, which might increase infection in time of plague.

Lord Hardwicke, chancellor, declined making any

order, declaring himself of opinion, that it was a charity likely to prove of great advantage to mankind; and said, that such an hospital should not be far from town, because those who are attacked with that disorder in the natural way may not be in a condition to be carried far.

Two things are to be considered.

1. Whether it is a nuisance at common law?

2. If it is, whether a public or a private nuisance?

As to the covenant in the lease, there is no foundation for the motion on that; for it is not a general covenant against all nuisances, but particularly against a brew-house. It comes to the general question. Cases are as cited. There was lately an indictment at the summer assizes, in Essex, 1750, against *Frewen*, for such an hospital: the defendant was acquitted. This cannot be called a private nuisance; if any, it is a public nuisance: the former is to one person only, as building against lights; nuisance, *ad vicinatum*, is a public nuisance.

Bills of this sort are founded on being nuisance at common law. If a public nuisance, it should be an information in the name of the *Attorney-general*, and then it would be for his consideration whether he would file such an information or not; and that was the case *for* stopping a way behind the Exchange in the city. *Lord King* recommended it to the Attorney-general to prefer an information in the King's Bench, to try whether it was a nuisance or not. If the cases cited were law, query, how far they would extend to all the hospitals in this town?—Motion rejected.

CHAPTER VII.

OF THE AGREEMENT BETWEEN THE CORPORATION OF LONDON AND THE ROYAL HOSPITALS CONNECTED THEREWITH.

I HAVE deferred mentioning an agreement between the corporation of London and the governors of the several principal hospitals of the metropolis, as the subject was a matter of local jurisdiction, and did not touch any of the subjects which have occupied the preceding pages of this work; but as the legislature have sanctioned that agreement, and thereby rendered its covenants as binding as any public law upon all the parties, it cannot properly be omitted.

Various differences of opinion having arisen previous to, and in the year 1782, between the corporation of London, governors of the royal hospitals of Edward VI. of Christ, Bridewell, and St. Thomas, and of the royal hospitals of Henry VIII. of St. Bartholomew's hospital, and Bethlem hospital, and the presidents, treasurers, and acting governors of those hospitals, respecting their rights, powers, and privileges in the government of them and of their estates—several meetings were held for the purpose of terminating these differences, and articles of agreement were entered into in pursuance of resolutions of all their respective courts:— 22 G. 3. c. 77.

Reciting that the ordering, management, and government of the said hospitals and their revenues were vested in the corporation by several charters, dated the 13th Jan. 38 Hen. VIII. and 26th June, 6 Edw. VI. for

such uses and trusts as are therein expressed; that the corporation assumed the management, and made several orders therein; that at a court at Christ's hospital, on 27th Sept. 1557, by the governors of all the hospitals, it was agreed, that the hospital of St. Bartholomew should be thenceforth united to the rest and be made one body with them, and certain officers were then appointed for all the hospitals, and they continued under the same kind of management, with a small increase of governors, down to the year 1564; when, upon the 21st of Sept. in that year, being St. Matthew's day, a president, treasurer, and other governors were chosen at Christ's hospital for each of the said hospitals; and these elections upon St. Matthew's day were continued annually down to the year 1587, and from that period courts were at several times held at Christ's hospital, down to the year 1652, inclusive, for electing or confirming governors of the said hospitals, but not yearly, or in the same regular manner as thentofore. And courts were also held during that period at and for the said hospitals for nominating and electing governors, and for the management of the said hospitals; and from that time it did not appear that such annual elections on St. Matthew's day were kept up or observed at Christ's hospital, for nominating or electing governors, save only for confirmation of governors elected at the said hospitals. But it appeared that the governors of St. Bartholomew, Christ, Bridewell, and Bethlem, had been chosen at general courts or committees held at the said hospitals from the year 1652.

That it also appeared by the ancient records or entries, that lists of the governors chosen for St. Bartholomew, Bridewell, Bethlem, and St. Thomas, had been annually sent from those hospitals to Christ's hospital, previous to the

the meeting of the governors on St. Matthew's day, for confirmation, and had been constantly delivered to the clerk, and by him, together with a list of governors of Christ's hospital, presented to the lord mayor, and by him immediately delivered over yearly at that time and place to the town-clerk of the city, attending his lordship on those meetings in the presence of the aldermen, or great part of them, without making any objection to, or attempting to alter the lists in any respect, or that mode of confirmation; which practice had been continued as to all the said hospitals to that time, except that the presidents, treasurers, governors, and officers of the several hospitals were for some years appointed by certain commissioners authorised by Cha. II. for their regulations.

That great benefit had been derived to these charitable institutions from such mode of managing them, and from the voluntary contributions, grants, bequests, and donations of the persons so elected governors.

That disputes had arisen between the corporation and the persons acting as governors, respecting their rights, powers, and privileges in the managing the said hospitals and their revenues, and that it would be for their mutual benefit that these differences should be amicably terminated, and that the management should be for ever after continued in the corporation, together with the governors then acting, or to be elected as such in the usual mode of election of governors there, and such of the commoners of the city as should be elected in the manner after directed, with such powers and such uses, and under such restrictions and trusts, as in the said charters and in the said recited articles were expressed.

To effectuate these salutary purposes—

1. The agreement, bearing date the 15th June, 1782, declares, that the governors of the said hospitals of St.

Bartholomew, Bethlem, Christ, Bridewell, and St. Thomas the Apostle, named in the lists delivered on the 21st Sept. 1781, being St. Thomas's day at Christ's hospital, to the town-clerk by order of the lord mayor, and also those governors who have been elected since the delivery of such lists, together with the lord mayor and aldermen, and also the members of the court of common council, to be nominated in the manner after-mentioned for the time being, shall be established and confirmed governors of such of the hospitals of which they had been elected governors previous to the delivery of such lists, or had been since their delivery, or in future shall be elected governors in such manner and with such rights, &c. as any governors thereof, or at any time since the first establishment of the annual meetings at Christ's hospital, on St. Matthew's day, could have had in the management of the concerns, and of the real estates and possessions of every denomination, and of the rents and revenues thereof, and of all personal estate belonging thereto; and such governors so elected at general courts or committees thereof in such manner as they ought to be elected or chosen by the rules used and established therein, together with the lord mayor and aldermen, and members of the court of common council, to be nominated as *aforementioned*, shall have good right, full power, and absolute authority at all times hereafter to nominate, elect, and appoint the presidents, treasurers, and all other officers and ministers of the said hospitals, and to do all acts expedient for their good government, and in the management and disposition of their estates, real and personal, as fully as the governors have heretofore acted therein, without interruption of any persons or bodies corporate whatsoever.

2. That at all times thenafter, whenever it shall be expedient

pedient for the mayor, aldermen, and other governors acting and to act, to prosecute or defraud any suits, distresses, ejectments, or other acts or proceedings, either at law or in equity, concerning their rights, &c. they shall use and assume the names, stile, and title of "The mayor "and commonalty and citizens of the city of London, "as governors of the house of the poor, commonly called "St. Bartholomew's hospital, near West Smithfield, Lon-"don, of the foundation of King Henry VIII.—and as mas-"ters, guardians, and governors of the house and hospital "called Bethelem, situate without and near to Bishops-"gate, of the said city of London;—and as governors of "the possessions, revenues, and goods of the hospitals of "Edward, late king of England the VIth, of Christ, "Bridewell, and St. Thomas the Apostle;"—or of such of the said hospitals concerning which, or the rights, &c. whereof such suits, &c. may be commenced; and that in all such cases the costs and damages incurred and sustained thereby shall be borne and paid by the respective treasurers out of the funds or revenues respectively, and the corporation and their estates and property belonging to them in their separate capacity, other than those vested in them for the use of the said hospitals, shall be indemnified therefrom; that if the treasurers shall not make such payments, and the corporation and its estates, other than those so vested, shall be charged with such payment; then that the corporation may enter upon the lands, &c. of the hospitals in particular, and whose legal interest is vested in them under the aforesaid charters, and hold and receive the rents, &c. until such sum shall be fully paid and no longer.

3. That the seal of the aforesaid hospitals shall be restored to the chamber of the city, and be kept as heretofore by the chamberlain in a purse or box, sealed with

the seals of the lord mayor for the time being, and any of the aldermen who shall be present at the time the seal shall be used; and that all leases of any lands or tenements of the said hospitals, and all deeds, presentations, and other instruments relative thereto, or to the estates thereof (after having been examined, approved, and signed by the presidents or treasurers, and such a competent number of the aldermen and other governors of such hospital, to which such leases relate, as have been used to examine, approve, and sign the same, shall be left at the chamberlain's office for the seal to be affixed thereto, with such document or writing explaining the purport of such leases, &c. as heretofore) shall thereupon be sealed in the next court of aldermen or of common council, whichever shall first happen, without any reading, addition, examination, or alteration thereof.

4. That the common council shall or may at their first court after the 21st of Dec. then next, or at any subsequent court, nominate 48 persons members thereof, out of which number the names of 12 shall be sent to St. Bartholomew's hospital, 12 to the united hospitals of Bridewell and Bethelem, 12 to Christ's hospital, and 12 to St. Thomas's hospital, to be governors thereof respectively, and such names shall be entered in their books in the order sent, and every of them shall be from thenceforth governors of the respective hospitals, and shall act as such in all matters for so long and for so many years successively as they shall continue to be members of the said court of common council, or shall be re-elected as such members, and shall enjoy the like privileges which the other governors not being aldermen enjoy, and that when any one of them shall die or cease to be a member of the common council, or shall not be re-elected into such office, the said court of common council shall

and

and may nominate another member, and so in like manner as often as any new governor shall die, &c. the court of common council shall fill up all future vacancies, so as that 12 members may for ever be governors in each of said hospitals, and that 12 may be governors of the united hospitals of Bridewell and Bethelem; and all persons to be chosen by the common council upon any such vacancy (after his name shall be sent to the hospital where the vacancy shall happen) may act as governors, and be entitled to all the privileges as the governors first chosen; Provided that nothing shall prejudice the rights of such members of the common council as become governors of the hospital, by election of the governors thereof in the manner heretofore used, over and besides the 12, who shall be governors by virtue of this agreement.

Lastly, For removing all doubts touching the observance of this agreement, it is agreed that it should be submitted to the consideration and confirmation of the legislature, so that the same may be established and confirmed.

The act also recites, that it was conceived that it would be greatly for the benefit of the said several royal hospitals, and tend to restore and establish the permanent peace and good government of the same respectively, if the agreement could be confirmed and rendered valid and effectual.

It was at the prayer of the corporation, governors of the possessions, revenues, and goods of the said hospitals, and the presidents, treasurers, and acting governors of the said several royal hospitals, respectively, enacted, that the agreement, and every the covenants, clauses, provisoes, stipulations, and agreements therein contained should be, and the same were thereby ratified, confirmed, and established according to the tenor, purport, and

and true intent and meaning of the same. And that for rendering the agreement more effectual, the corporation, and all other parties thereto, should perform the several matters therein contained, not only as governors of the said hospitals of Christ, Bridewell, and St. Thomas, but also as governors of the house of the poor in West Smithfield, and as masters, keepers, and governors of Bethelem hospital, as fully to all intents as if the corporation had been described therein by the respective corporate names before-mentioned.

That this should be a public act, and all judges *and* justices should take notice thereof, without specially pleading it, saving to the crown and to the corporation, and all other persons and bodies corporate, all rights which they had before the act, except such only as were relinquished, altered, or modified thereby.

Upon the authority of this act the whole arrangement of the rights of the corporation, and the power of election of governors of each of these hospitals, has been exercised. The corporation is represented in the court at Christ's hospital by the presence of the lord mayor, aldermen, and twelve members of the court of common council, agreeably to the first clause of the agreement; the twelve civil governors continue to be appointed under the fourth clause, and the tenor of the whole agreement effectuates that which was thus designed to reconcile all the parties: and under the stipulations of the second clause the consent of the city is concluded, that for all the purposes of protecting the property, real and personal, of the several hospitals, the respective courts or committee use the name of the corporation as governors of the particular hospital in question, in prosecuting or defending any process that might be necessary; which is consistent with the

tenor

tenor of the first clause, which directs that the governors elected at their respective courts, together with the lord mayor, aldermen, and members of the common council, which constituted part of the corporation, should have power to elect officers, and do all acts, or be acting governors thereof; by all which it appears, that this part of the agreement is explanatory of the intention of all the parties, that the right of the corporation in the management of the hospitals should be limited to the number and quality of the persons therein specified.

The legislature having received this agreement, and given it the force of a public law, no question can now arise as to its validity, or as to its binding power upon the corporation, and upon all these hospitals; and any violation of its strictest regulations will be contrary to the act, and punishable as such. Some differences of opinion between the corporation and the governors have lately arisen, affecting the meaning and extent of the privileges granted by this act, but they have not come beyond the walls of their own court, and therefore cannot, with any propriety, form a part of this work.

CHAPTER VIII.

OF FRIENDLY SOCIETIES.

FRIENDLY Societies were first established by mutual consent of the subscribers, and afterwards protected by parliament in 1793, by 33 Geo. III. c. 54. for the purpose of raising, by voluntary contributions of the members, separate funds, for the mutual relief and maintenance of the members in sickness, old age, and infirmity; these were the motives which actuated the parties—the legislature saw that they were likely to promote the happiness of individuals, and to lessen the public burthens.

They were authorised, therefore, to proceed to assemble, to make rules, and to choose a committee; their regulations being submitted to the justices at their quarter sessions, in order to attain validity. They may appoint officers to carry into effect the purposes of their institution; and their treasurer or trustees are to give security for fidelity to keep proper minutes of their proceedings, and to invest the surplus of their receipts in the public funds, for the use of the society. Unfaithfulness of the treasurer or trustees is subject to the investigation and discretionary order of courts of equity, who are to appoint a clerk of their courts to carry on any petition for that purpose, without fee.

So favourable to this institution was the legislature, that by sec. 10. it is directed, that if any officer of the society entrusted or having in his hands any monies, securities, or effects belonging to the society at his death, or bankruptcy, or insolvency, his representatives or assignees

signees shall, within forty days after demand made, by order of the major part of the society, assembled at any meeting thereof, deliver and pay the same to such person as they shall appoint, before any of his other debts are paid or satisfied; and all such assets and effects shall be bound for the payment thereof.

All the societies' effects are vested in their treasurer, who may sue and be sued, and no such suit shall abate by his death.

Before the rules are confirmed at the sessions, the society shall declare all the intents and purposes for which such society is intended to be established; and direct the uses to which their money shall be applied, and in what *shares*, and under which circumstances any member or other person shall become entitled thereto. And the society shall not be dissolved so long as the intents declared thereby, or any of them, remain to be carried into effect, without the consent of 5-6ths of the then existing members, and of all persons then receiving or being entitled to relief; nor shall the society direct the stock to be otherwise applied.

Sec. 14. They may receive donations of any persons towards the supply of their stock or fund, to be applicable to the same general purposes as the contributions of its members, and not in any other manner.

And by sec. 15. two justices are vested with power to hear, and finally to determine all grievances. Sec. 16. Except where the rules appoint an arbitrator. The members are not to be removeable from the parish, until actually chargeable, and this under certain regulations.

This being finally declared to be a public act, and to receive donations constitutes these societies to be *public charities.*

In

In 1795, by 35 Geo. III. c. 111. a further time was extended for friendly societies to exhibit their rules to the Michaelmas quarter sessions of 1796. And there being several charitable institutions and societies for relieving, by contributions and benefactions, widows and orphans, and families of the clergy and others in distressed circumstances, which had funds that they wished to invest in public securities, under the management of a treasurer, to give stability thereto, it became necessary that their property should be secured by authority of parliament. The governors, &c. of any institution for such purpose are authorised to frame rules for the management and distribution of their funds, and to alter them as occasion should require, which are to be submitted to the justices for confirmation within the time above-limited, that they may appoint a treasurer, who shall give security, and be entitled to all the benefits of the foregoing act.

1 Eden's State of the Poor, 601.

This act effectually removed many difficulties which friendly societies were subject to, whenever they chose to avail themselves of the benefits held out to them by the legislature. Before this act passed it frequently happened that the minority of a club (which by the rules was often competent to make laws) expelled all the absent members on slight pretences, in order to favour the views of some interested ale-house keeper.

Persons thus injured were left without the means of redress. The inability to sue and be sued (which numerous bodies of men having one common interest often feel, but which probably was not much felt by friendly societies) was also effectually removed; and the clubs can now, if it should be necessary, easily enforce payment from the officers to whom they have entrusted their funds. Another great and essential advantage conferred on such of these institutions as had their rules confirmed by

by the justices was, the privilege of carrying on their occupations and trades in the most convenient place, without being subject to be removed to their legal settlement. This encouragement, however, is in a great measure done away by the act passed in 1795, for preventing the removal of poor persons till they become actually chargeable. 35 G. 3. c. 101.

This act, however, in order to relieve the parish in which the party is allowed to reside from incidental burthens, provides, (as the friendly society act had done in the case of members of societies who had taken the benefit of the act) that no person shall gain a settlement by notice, or by payment of parish-rates "for any tene- "ment not being of the yearly value of 10l." Sect. 4.

These twelve last words are not in the friendly society act; upon which Sir Fred. Eden remarks, that as a long residence, under the 35 Geo. III. may preclude the possibility of ascertaining the settlement when a person becomes chargeable, the ease of parishes would have been greatly promoted by the introduction of clauses similar to the 19th, 20th, and 21st sections in the friendly society act; concerning which the gentleman who framed the bill makes the following judicious observations, in a little pamphlet well worthy the attention of every benefit club. He says,

"Various regulations and provisions are introduced "into the act for the purpose of preserving the parish, in "which the party shall be allowed to reside, from any "incidental burthens; such as enabling the parish to "ascertain and fix the place of settlement to which the "party may be removed, when he shall become actually "chargeable. It appears to have been the intention of "the legislature to have done this formerly in the case of "soldiers and mariners; examinations were allowed to "be

" be taken of the settlement of the party, which became " evidence in favour of the parish wherein he should re- " side, against the parish charged; but the latter had no " means of contesting the truth of that examination, " until the party should be actually removed, when per- " haps all other testimony might be lost.

" This inconvenience is remedied by the present act, " as it requires that the parish charged with the settle- " ment of the party shall have immediate notice of the " examination, so that the point may be put in a train " of enquiry, if it shall be necessary, whilst complete " evidence respecting it may be obtained on both sides; " and it seems that the only material alteration made by " this act, from the general law respecting the settlement " of paupers, is, that this inquiry may take place without " the actual removal of the individual whose settlement is " in contest, and consequently at less expence and in- " convenience; but, in all other respects, with equal ad- " vantages to the litigating parties."

The great encouragement which this act gave to societies of this nature was such, that in less than three years afterwards there were no less than 600 friendly societies in the metropolis and its vicinity, composed of mechanics and labouring people, who distribute to the sick members, and for funerals, from their funds raised by monthly payments, about 36,000l. a-year.

1 Eden, 464. 616.

Mr. Colquhoun then estimated the number of their members at 70,000, or 116 upon an average in each society; but Sir F. Eden conceived that computation to be too high, and that they did not exceed 80.

They are charitable institutions, although in one part of their establishment they differ from all others, for their members are both contributors and objects. Since the commencement of the present century, these associations

tions have been gradually extended to most parts of Great Britain, and they have considerably encreased in North Britain, where they are said to be of great service in preventing labourers and working manufacturers from becoming burdensome to the public.

But after all the attention paid to this subject, even by those who framed the act for the establishment of these societies, it seems to have escaped their notice, that although any member has a remedy for any grievance against the society, yet the act has not provided any for the society against any of its refractory members, to enforce the adjudication of fines inflicted under the authority of the bye-laws; this defect has at length been ably stated to parliament by James Macdonald, Esq.* and leave was given on the 14th April, 1809, to himself, with G. Rose, and Wilbraham Bootle, Esqrs. to bring in a bill for this purpose, which is now in due progress.

In the north of England instances may be found of clubs of this kind which have existed above an hundred years; their utility has been so fully recognised, that various benevolent writers, within the last fifty years, have suggested schemes for extending their operations to every village in the kingdom; of whom Mr. Alcock, Mr. Acland, Mr. Gilbert, and the late Rev. Dr. Richard Price, may be mentioned with the respect they deserve.

The private as well as public benefits arising from these associations have been also acknowledged in several instances, of which it may be sufficient to mention the following:

There is a very numerous class of laborious men who

* M. P. for Newcastle-under-Lyne, son of Ch. B. of Exchequer.

are called skippers and keelmen, employed in navigating keels or flat boats used for conveying coals from the staiths on the banks of the Tyne and Wear, to the ships lying upon the river Wear; their daily occupation obliges them to reside in the same township, so that when they or their families became objects of parochial relief, either the parish or township in which they were settled was grievously burdened, or sufficient provision was not made for their support: to remedy which the legislature, in 1792, passed an act, not found among the statutes at large, for forming them into a society, and establishing a permanent fund, by the allowance of a small sum out of their wages, which they are willing to make, to be applied for the relief of themselves and their families, in case of sickness, old age, or infirmity, and of their widows and children.

This act of incorporation appoints forty-one guardians, to be elected annually, who are empowered, without license in mortmain, to purchase or receive such lands or tenements as may be wanted for the establishment of an hospital, with its necessary offices and apartments. They are to provide such hospital for the reception and maintenance of such skippers and keelmen, employed in the coal-trade on the river Wear, as shall, by sickness or other accidental misfortunes, or by becoming decrepit, or worn out with age, be rendered incapable of maintaining themselves or their families; or by allowing them pensions, and to relieve their widows, and children under twelve years of age, or if above that age, not capable of getting a livelihood by reason of lameness, blindness, or other infirmities. They are to contribute one halfpenny per chaldron carried in their keels during their employment, which

which the coal-fitter is authorised to retain out of their wages.

The act likewise contains full regulations for the meetings and organization of the society, and for procuring a fair account of its receipts and applications, election of officers, &c.

This institution does not conform to the first principle of friendly societies, which is, that they shall be governed by rules of their own formation, to which the members have individually consented; but it gives them a certain degree of influence over their legislature (if I may so call it), by the power which every member may once a year individually exercise in the appointment of stewards, by whom the guardians are to be chosen.

That these institutions increase the comforts of the labouring classes who belong to them, will be evident from comparing the condition of those who are members of them, and of those who in the same village are contented to rely on the parish for relief. 1 Eden, 614, 616.

It would lead me too far out of the plan of this work, were I to pursue the suggestions offered by Sir Frederick Eden on the subject and improvement of friendly societies, on which, as on all his investigations concerning the state of the poor, he may be justly deemed an authority; but the references in the margin will enable the reader to consult him at large.

In his preface (p. xxiv.) he wisely remarks, that friendly societies have established one great and fundamental truth of infinite national importance, viz. "that, "with very few exceptions, the people in general of all "characters, and under all circumstances, with good "management, are perfectly competent to their own "maintenance." He adds, that he had not found that

any parish has been burdened with the maintenance of a member of any friendly society, nor are the instances numerous of the families of members becoming burdensome. This being the case, it is evident that the nation must have saved many thousands of pounds (perhaps millions) by these useful institutions.

To these suggestions may be subjoined Mr. Davis's account of a friendly society in the parish of Horningsham, which deserves particular attention, and may serve as an excitement to the adoption of a similar plan in other places: this parish contains about 200 families, and by advancing to each of its members a bounty of 15s. for every child born in lawful wedlock, it has administered to the comfort of lying-in women, and become the means of preserving their offspring.

The number of members have been, on an average of the last ten years, 84.

The number of children for which bounties have been paid in ten years, 1794 to 1803, has been, 198 paid for at the birth, and 176 paid for at the end of a fortnight; so that twenty-two only died within the fortnight: and upon examining the parish register, it appears that only seven have died since.

It follows that 169 out of 191 children born, were living at the time when Davis wrote, and that the diminution by deaths has been very little more than one-sixth of all the children born; whereas no writer on the subject has ever calculated on the loss of less than one-third within two years after birth, and some have reckoned nearly one half.

See an account of this society by Mr. Thomas Davis, in Vol. II. of Letters and Papers of the Bath Agricultural Society.

I have

I have mentioned these institutions, from a conviction of their public importance and utility, and to shew that the legislature has deemed them proper objects of its cognizance, and thereby designated them to be public charities: and if it can be questioned whether they have in any manner contributed to reduce the poor-rate, it may be fairly answered, that they have prevented it from a considerable increase.

CHAPTER IX.

OF THE TERM PUBLIC CHARITIES.

Ante. 503, 541. In addition to what has already been advanced on this subject, it may be observed, that there are many charities which cannot be denominated *public* charities, such as legacies to poor persons of any description, not united by any local and visible establishment or society; not that an act of incorporation is necessary to constitute any charity public; but it must have notoriety and some locality, or be in some way recognised by the legislature; as the poor of a parish, friendly societies, and the like. Each particular object may be private in himself, but the extensiveness of the institution of which he partakes, will render it a public charity. Lord *Hardwicke* said the word "public" may be used only by way of description of the nature of the charity, and not by way of distinguishing one charity from another; for it is almost impossible to say which are public and which are private in their nature.

2 Atk. 87. Atty. v. Peirce, 1740. Barnardist. 209.

The charter of the crown does not make a charity more or less public, but only more permanent: it is the extensiveness of the will which constitutes a public charity.

A devise to the "poor of a parish," is public; and when a testator has not any person in contemplation, but leaves the choice of objects in the discretion of the trustees, though the persons be private, the charity may be called public, from the extensiveness of their benefit: a bequest for poor housekeepers of any district is of this kind. It has been sometimes insinuated, that the word *public* could only apply to such charities as are incorporated,

porated, and have perpetual continuance; but there are others which are of as general a nature as those, and may therefore be called public.

The legislature has also, in most if not all of its revenue acts, recognised charitable institutions in general terms, whether corporate or not, by exempting the scite, buildings, and funded property from the duties otherwise chargeable; whereby their lands have been left out of the valuations, and the value of the officers' apartments only have been rated, and the duty retained out of the dividends on their funded property has been returned. The poor-rates, high way-duties, church-rates, and other assessments are made upon the same principle, and the officers' apartments only are charged as single tenements. 2 Burn. Eccl. 286.

Whatsoever hospital or charitable institution is founded by subjects, under the benevolent privileges granted originally by the act of Eliz. is thus comprehended and recognised as a public charity, by being made subject to parliamentary regulation, not only in cases of revenue, but in the statutes that relate to visitation.

The great encouragement and support thus given to charitable institutions, by legislative and general protection, have formed the basis of their establishment, and the promotion of their extensive and general progress.

It cannot surely admit of a doubt, that wherever there is a public building, designated by an engraved title on its front or outside, divided into a chapel, halls, or rooms for general and open meetings of subscribers, wards occupied by patients, and apartments for the subsistence and rest of the servants employed therein; and moreover, where any of those patients resort to offer thanks in their places of public worship, for their recovery in such house, hospital, or dispensary, or by means of its

administration; and where public advertisements in daily newspapers announce public meetings of the subscribers or inhabitants of a town or district, for the support, or upon the affairs of a charity; and where public sermons are preached in, and collections made at the door of any parish church or chapel, for its benefit; in all these cases the notoriety of the institution in question is so declared, that there can remain little doubt of its being properly deemed a public charity.

It should seem from what has been offered, that the question, What is a public charity? has been *fully* answered: but as in all cases which are brought forward either simply to take the directions of the court, or with a hope of success if something unexpected should present itself, or where the parties interested are fearful of consenting to any act of themselves, so this question was lately revived, upon an apparent distinction made by the donor, very similar to the case before-mentioned of *Atty.-gen.* v. *Peirce.*

Clark v. Foundling Hospital. 1809.

Mrs. *Elinor Evanson*, of Bath, widow, by will dated 21 Feb. 1800, bequeathed legacies to several charities, some of which were public establishments, and others to the poor of several parishes there, and to distressed housekeepers not receiving alms. And after bequeathing several other legacies, she ordered her executors to dispose of the residue of her personal estate to and amongst the *public charities* which she had therein before particularly named, equally to be divided between them. She died in the August following without revoking this will. One of the public charities was not then in existence, and the executors having paid the pecuniary legacies, a question arose as to the division of the residue.

It was held that the legacy to that hospital, which had not existence at the time of her death, lapsed on that account

account into the residue, and that the said hospital (the Magdalen, at Bristol) was not entitled to any share thereof.

That her intention must be taken to divide her residue among such of the other named public charitable institutions which had been established, and were already open to receive the contributions of the public, previously to the making her will; and that, therefore, such only out of all the charity legatees which she had named could participate in this residue; for, like the will of Mrs. Northcote, she did not mean to augment the private legacies, which had been given by way of charity. This went to the exclusion of poor housekeepers, at the discretion of her executors; to debtors in prison; to overseers of three parishes; all of whom had been named in her list of legacies; for these did not come within the meaning of her expression in the bequest of her residue among public charities. The court therefore directed the master to ascertain the clear residue, and to inquire whether any of the charities to which legacies were given by the will were public charities, and the nature of them. Atty. v. Peirce. Barnardist. 208.

Upon this inquiry the several charities interested and claiming a share of this residue, stated their original establishments, the nature and objects of their institutions, and their notoriety as it arose from local situation, public acknowledgment, the unlimited or limited extent of their benevolence, and the publicity of their proceedings with that, as well of their patients as of their benefactors. That publicity was two-fold: 1. Their general and acknowledged notoriety; and, 2. Their being recognised by the state, either by statute or by charter. That their publicity did not depend upon any act of incorporation, or even on their being named in any statute; for though that would render it a creature of the state, yet it would not alone render it public, but only more public;

public; for this consists merely in notoriety and general acknowledgment or acceptance by the community in and about their vicinity, by the name and by the execution of the benevolent plan under which they have been established. That indeed where charities are particularly named, or any provision made for them in any legislative act, there cannot arise any doubt of their publicity; but where, without being particularly named, they are provided for as in respect of their being directed to be licensed by the quarter sessions, and to have an inscription at their public entrance, as in the case of all lying-in hospitals, by the 13 Geo. III. c. 82; as also in the case of friendly societies, and of all hospitals, colleges, and trusts established by deed for charitable purposes, by the act for levying a duty on property, 46 Geo. III. c. 65.; as also in the statutes and uniform decisions relative to visitation of hospitals and charities (from 2 Hen. V. st. 1. 14 Eliz. c. 5. 39 Eliz. c. 5. to the present times), whereby the crown is the general visitor, where none has been nominated by the founders, and which right is exercised by his majesty's attorney-general, who is a public officer. And also in the universal acquiescence with the decision relative to taxation, either of land-tax, house or window-tax, highway-duty, or consolidated rates, in which their scite and buildings are left out of the valuation, and the assessments are made on the officers' apartments only as single tenements. In all these cases, and in others which might be suggested, they must be deemed public charities.

2 Vez. 328. 552.

2 Burn Eccl. 286.

I conceive that the establishment of any charity by act of parliament, is sufficient to give it that character which is necessary to constitute it a public charity, several of which are enumerated in a preceding part of this work (Part II. ch. II.), and to which may be added friendly societies already mentioned.

CHAP.

CHAPTER X.

OF CHARITABLE DONATIONS IN GENERAL, AND THE BILL FOR REGISTRY AND TRANSFER CONSIDERED.

THE universality of charitable gifts in this country is of an amount almost incalculable, even of those which are known and may be found upon record; there is not a county, nor a parish, nor a ward, nor a corporation of city, or town, or borough, nor a company chartered in ancient times for the preservation and encouragement of trade and manufacture, and numberless other institutions, which have not either from their own funds, or by the will or deed of investment of some of their members, become trustees for the distribution of alms, or for the establishment of relief in various modes of charity.

The legislature, so lately as in 1786, thought it expedient to have a general inspection of these funds; and therefore as they had directed enquiries to be made into the state and condition of the poor, passed an act to enable them to procure information, upon oath, of the several charitable donations for the use and benefit of poor persons. The ministers and churchwardens of parishes were directed to deliver returns, on oath, to the justices at a meeting to be appointed by them, on receipt of copies of the act from the high constables, under a penalty for their neglect. These returns were ordered to be transmitted by the clerks of the peace to the clerk of 26 G. 3. c. 58.

of the parliament. The act to be read at the Midsummer quarter sessions, and in every parish church on Sunday next after July 31, 1786.

Persons not making a discovery of lands or money in their hands left for charitable purposes prior to 30th Sept. 1786, were to forfeit a sum equal to one-half of the value thereof, to be divided between the informer and the crown, and to be recovered by distress and sale, one moiety to be paid to the informer, and the other to be applied in aid of the rates. Persons making false oaths liable to the pains of corrupt perjury. Fees for returns to clerk of the peace, 1s.; high constable, 1s. 6d.; Justice's clerk, 6d.

Questions in the schedule, to which answers are to be returned.

1st. That charitable donations have been given by deed or will, for the benefit of poor persons within your parish [or place]; by whom, when, in what manner, and for what particular purpose were they given to the best of your knowledge, information, and belief?

2d. Were the said respective donations in land or money; in whom are they now vested, and what is the annual produce thereof respectively, to the best of your knowledge, information, and belief?

Very few returns have ever been made pursuant to this statute; and it has been alleged, that many donations for charitable purposes in several parts of the country have been lost, and others, from neglect of payment and the inattention of those whose duty it was to superintend them, have been in danger of loss, and which it has now become very difficult to recover and preserve. A bill has lately been introduced into the house of commons to remedy this evil, by a registry of all charitable gifts by will or otherwise; but the further consideration of its progress

gress and regulations has been necessarily postponed until a future session; it may be therefore sufficient to observe here, that every measure of expence, trouble, and delay in the execution of charitable trusts should be carefully avoided; and that as there are already two registries of every will, one in the diocese and the other at the stamp-office, it is presumed, that all the purposes of the regulations proposed would be answered by an act which should be declaratory of the duty of all executors and trustees, under considerable penalties, to give immediate notice, in writing, to all legatees and cestuys que trust of any legacy bequeathed to them.

CHAP.

CHAP. XI.

PRACTICAL NOTES.

In addition to what the student will have met with in his perusal of the foregoing pages, the following notes may assist his practical studies.

2 Atk. 329. Atty. v. Bucknal, 1741. As to parties in an information for charity, any persons, though they may be the most remote in the contemplation of the charity, may be relators.

2 Ves. 328. Where a charity is not incorporated, the information for relief is not to be dismissed, though the relief prayed fail; otherwise, if it be incorporated by charter. This shews peculiar favour and protection to charities, supposing them to require protection, more if they be not incorporated than when they are thereby become creatures of the state.

1 Ves 72. Atty. v. Smart. 1747. The general rule that an information for a charity is not to be dismissed, but that there must be a decree to establish it, holds only in cases of private charity, *and* not where they are founded by the crown.

1 Atk. 355. Atty v. Jeanes. 1737. And the court will give proper directions relative to a charity, notwithstanding any impropriety in the prayer of an information.

Born. v. Jackson 4 Ja. 2 B. R. Comberb. 93. A prohibition lies from the King's Bench on a libel in the Spiritual Court, for shutting and locking up a chapel that belonged to an alms-house, where 10l. a year was granted to the parson for reading prayers; for the parson may have an action on the case for the temporal loss of the 10l. if he does not read, and he cannot read if the chapel be shut up.

So

So a prohibition lies against a libel, as to the examination of any matters relating to the office of school-master; for when the bishop has once granted his license, he has executed his authority, especially in this case, where the school was of the foundation of Queen Eliz. and the king's chancellor was visitor; but they may proceed upon the article against him for being drunk, &c. which is *contra bonos mores.* Wood v. Hill. 7 W. 3 B. R. Comberb. 324.

In an early case previous to the statute, a sum was bequeathed to be laid out in land, in trust for a tenant for life, with remainders in tail, and remainder over to a charity. Upon the death of the tenant in tail his widow pretended pregnancy, and the master of the rolls directed the master to appoint two midwives, who should resort to the widow, search her, and see whether she was pregnant or not, and attend at the birth. The widow afterwards seeing there must be a discovery, acknowledged before the master that she was not pregnant, whereby the charity was preserved. It was the practice at that time to petition for a writ *de ventre inspiciendo.* Atty. v. La Roche, 1725. 2 P. W. 591.

The true way for an university (and by parity of reasoning, any other corporation having an exclusive jurisdiction) claiming conusance, is by letter of attorney from the university to claim it, and bringing the charter into court, and the exemplification of the statute which confirms the privileges, to proceed according to the civil law; which the king by his letters-patent could not do: and this may be claimed any time in the same term as the declaration. The warrant of attorney is first read, then the claim, then the charter, and an exemplification of the statute confirming the privileges; and the declaration is then produced, and afterwards the whole entered on the roll and carried in. Penn v. Manners. Fortes. 158. 11 Ann. 2 Ld. Ray, 1339. Newton v. Martin. Fortesque, 280.

Lord Hardwicke said, a commission under 43 Eliz. c. 4. may Ilchester Case, 11 G. 2. 1738. MSS.

may be issued to any borough or place, and not necessarily to the county at large, for the words of the act are "into all or any part or parts of this realm respectively;" and there is nothing in the act to restrain the court from granting it to any particular place. The statute does not import and ought not to be construed, that in all cases the jury must come out of the county at large; the acts relating to the trials of treasons and felonies, and taking inquisitions thereof, are penned in much the same manner with the present, and in those cases it is usual for the jury to come out of the place where the fact was done. And always, unless the contrary be enacted, acts of parliament must be construed agreeably to the course of the common law, as the statute *de donis*, and so it ought to be in this case. The precedents show that commissioners have gone to particular parts of counties, and a series of precedents makes the law, and sometimes where the words of an act are contrary thereto.

On the question, whether a jury can inquire into lands lying out of the borough, the act requires a jury "of the county;" and it appears by Duke on charitable uses, that upon a commission to the county at large, the jury may inquire into lands and chattels in another county; the words, "by any other lawful ways and means," seem to mean a more large inquiry than is warranted by the common law; and as to the commission, the words directing the inquiry refer to the charitable uses, and to the execution of them, and not to the place where the lands lie. These committees were framed, I believe, by the officers upon those of lunacy, &c. which are penned in the same manner.

The act extends commissions to towns-corporate, notwithstanding the saving clause.

Muckleston v. Browne. If the allegations of a bill or information are necessarily confined

confined to a trust, or secret trust, the interrogating part must be construed according to the alleging part, and is not to be considered more extensively than the propositions out of which the interrogatories arise. 6 Ves jun. 52. Ante. 112.

A new relator may be named in the room of a deceased relator. Atty. v. Powel. 1 Wyat's Dick. 855.

Before inrolment of the order made, on arguing exceptions to a decree of charitable uses, it may be reheard. Rawson v. Turner. 27 May, 1775.

If an information is brought in the name of the attorney-general, and it appears that there is a charity which the court of Chancery ought to support, though the information is mistaken, by praying such relief for the charity as cannot be had, yet the court will not dismiss the information, but will support the charity in such manner as can be by law; and this rule was observed by the commissioners for charitable uses. Qu. 1725. Ca in Cha 42. S. C. semb. 2 Wyat's Dick. 519. Barnardist. 151. 490. 1740. 2 Vez. 426. Atty. v. Breton, 1752.

And the court will presume the charity to be as there stated, unless evidence be offered of the contrary.

Where a charity is so given that there can be no objects of it, the court will order a different scheme to be laid before it, yet if the objects may exist, though they do not at present (as widows, though there are no widows at present of the members) it will not; and if the relator appear to have no title, the court will not make a decree, but dismiss the information: costs cannot be given out of the charity. 3 Brown, 166. Atty. v. Oglander, 1790. 1 Vez. jun. 246.

Upon a bill for equitable relief as to a *rent charge*, with some few exceptions, all the persons whose estates are liable must be brought before the court, that complete justice may be done, and the question tried in the presence of all who are interested; but this rule has been dispensed with under circumstances rendering it impracticable; formerly it was held, that no distinction ought to be made in the proceedings between a charity and an 11 Ves. jun. 368. Atty. v. Jackson, 1805.

individual. But at this time it is much too late, with reference to a great many doctrines, to insist upon that: for the court does hold out relief to charities under circumstances in which it would not give relief against defendants in ordinary cases. In the case of a charity, it is not necessary that all the terre-tenants should be brought before the court; "they may, if they seek a contri- "bution, undertake to make them parties to the infor- "mation, or help themselves by such course as they "think fit." The principle here asserted is, that *prima facie*, a charity may sue without making them all parties. But see *Attorney* v. *Wyburgh*. Upon a plea in abatement it is not necessary to point out the parties by name; it is enough if the objection points out who the individuals are by some description, enabling the plaintiff to make them parties—merely referring generally to houses in London, not particularly describing them, the site of which may now perhaps be part of the king's highway, does not sufficiently point the attention of the relators to the individuals to be brought before the court: yet if it is left uncertain what are the lands and houses chargeable, together with those which are the objects of the information, though they may have been purchased without notice, lost, or are incapable of being distinguished, the court will go on, but will endeavour to aid the other persons who are brought before the court; not dismissing the information, but by inquiries, if any fair hopes can be entertained, endeavouring to bring them ultimately before the court, if it can be ascertained that they are not lost, or are capable of being distinguished.

Duke, 65. Atty. v. Shelly, 1 Salk, 164.

1 P. W. 399. Ante. 510.

The court has gone a great way in relieving against want of form and mistakes in pleading as to charities. And in such a case as that suggested, the court will inquire, whether the defendants are liable; whether, if liable, the court

Ibid. 371.

court will charge them, and leave them to a new suit with the other terre-tenants, or first deciding that those lands were chargeable will direct inquiries; whether any, and what other lands are chargeable with them, and will not stop for want of parties, it is better so to do, for otherwise the information ought to be dismissed.

On a devise of real and personal estate to St. Bartholomew's hospital, the governors and the next of kin agreed to divide the property, rather than agitate the question of mortmain; and this agreement was confirmed by a decree, although the hospital took 3-4ths and the next of kin 1-4th. 9 Mod. 286. Atty. v. Landerfield, 1744.

But in a modern case, the court refused to act under an award in a charity cause without the consent of the attorney-general, or a reference to the master, to see whether it was for the benefit of the charity; observing, that in these cases, where the information cannot be filed without the consent of the attorney-general, the principle requires his authority and consent throughout. And a motion was afterwards made, with the consent of him and the other parties, for an account, and for liberty to lay evidence before the master, not only as to the management of the estate, but also of the charity in question by the relators. 9 Vez. jun. 232. Atty. v. Hewit, 1804.

If trustees have a discretion to apply the profits of their lands to repair a road, the court will not interfere, unless they have acted corruptly, but will dismiss the information. 2 Vez. 552. Atty. v. Harrow School, 1754. Ante. 500.

Where an original deed vested in the parishioners and inhabitants of a parish the right of nomination to the curacy, those persons, like all other cestuys que trust entitled to the beneficial interest, have the right to call upon the trustees in the court of Chancery; and it is merely the ordinary case of a *cestuy que trust* of an advowson, 14 Vez jun. 7. Atty. v. Newcombe, 1807.

calling upon the trustee to present upon his nomination. The curate, when nominated, is entitled to a stipend; and Lord Hardwicke's opinion is clear, that as far as the title to that liquidated stipend is in question it is in the nature of a charity: with regard to which there is a right in the attorney-general to sue. There is an intimation in 1 Vezey, 43. *Attorney* v. *Parker*, and the fact is unquestionable upon Lord *Hardwicke's* note, that his lordship had considerable doubt, whether regarding the parishioners and inhabitants whoever answer that description, as cestuys que trust of the rectory having a right to nominate the curate, that is a title so much in the nature of a charity, that the party would have a right to sue in the name of the attorney-general: upon the same principle as the opinion expressed in *Attorney-general* v. *Hewer*, 2 Vern. 387; where the court said, that not being a free-school was not a charity: and then the proceeding in the name of the attorney-general was wrong; and if the inhabitants were *cestuys que trust*, it ought to be by bill.

Atty. v. Foundling Hospital, 1793. 4 Br. 165. 2 Vez. jun. 42. S. C.

On a motion for an injunction to restrain the governors of the Foundling hospital from building and making bricks on their own estate, on the ground of its affecting the salubrity of its situation and the health of the children educated there, and was in some other respects a deviation from the strict rules and objects of the charity, was stated, on all which the court might enjoin, as in the case of *Sutton Colefield, &c.* Ante. 514.

2 Vern. 397. 1 Vez. 534 2 Vez. 505. 551. Duke, 69.

Lord-commissioner *Eyre* said, he had not a doubt that the court had a jurisdiction over charities, and that where they are founded in charters or by act of parliament, and a visitor appointed, or where trustees or governors abused their trust, the court could take notice of such abuse; not in the character of a charity, but as an abuse of a trust;

trust; but that where the management of a charity was entrusted to managers and guardians by the charter or act of parliament, such governors had a right to exercise their discretion; and that as to opinion, although the court should be of a different one from such governors, it would not set up that opinion against the discretion of the trustees, and referred to *Rex* v. *Middleton*; and the other lords-commissioners concurring, the motion was refused. 2 Vez. 327.

The civil law preferred charity legacies to others; but in equity all are equal—all abate alike in case of deficiency of assets—all have the like interest for delay of payment after one year from the testator's death, unless a particular time is prescribed by the will for payment, and the court will not grant an injunction for a charity legacy in case of deficiency of assets. 1 Vern. 230. Fielding v. Bond, 1683.

The court of Exchequer refused to stay proceedings on an information by the attorney-general at the relation of a corporation, upon an affidavit made by two of the defendants, that one of the relators had acknowledged that it was brought without his privity or consent; for this might be a reason, if the relator applied himself for striking his name out, but no reason for delaying the rest of the relators. And upon the defendant's praying a dedimus to answer, the plaintiffs immediately craved an injunction, according to the prayer of the information, which was to injoin them from misapplying money received for the benefit of the corporation, which, though special, was granted. Atty. v. Norris. Bunbury, 258. 1728.

The master reported a proposal for the purchase of land, for a charity, but it was not decreed. 1 Vez. 218.

The testator having devised for a charity a copyhold estate, which he had surrendered to the use of his will, 2 Atk. 497. Atty. v. Sawtell, 1742.

and had signed some but not the latter sheets of his will, without any attestation, this was held to be a good appointment for the charity under the 43d Eliz. as to the copyhold estate.

8 Atk. 141.

The statute of mortmain has not abrogated the statute of frauds.

2 Vez. 552.

Where a visitor is appointed by the statutes of any college, there a commission under 43 Eliz. cannot issue; but it is otherwise of any collateral charity.

2 Vez. 328-9.

There is no technical form of words for granting the visitatorial power, and it may be divided. The vesting the legal estate of a charity in its governors does not exclude them from being visitors, as where they are to receive its revenues.

9 Vez jun. 547.

Exparte Dann. 1804.

The lord-chancellor as exercising a visitatorial power for the crown of a royal foundation, has no power to tax the bill of costs under proceedings before him relative thereto: for this is not a proceeding either at law or in equity. The visitatorial authority might have been vested in a bishop. This is not before the lord-chancellor as exercising his equitable jurisdiction. The proceedings contemplated by the statute, 2 Geo. II. c. 23. s. 22. are proceedings in a court of law or of equity. It is not in the court of Chancery that the king's visitatorial power is to be exercised. It is by the lord-chancellor; and therefore not within the act. Order for taxing discharged.

9 Vez. jun. 424. 1802.

In charity cases the court often gives the relators costs beyond the taxed costs, as in *Attorney-general* v. *Taylor*, *Twisden* v. *Adams*, *&c.*

13 Vez. jun. 585.

It is too much to say the charity estate is to be redressed at the expence of those who seek to redress it. The consequence would be, that all charities would be for ever liable to abuse without redress.

If

If trustees suppress or conceal any evidence relative to the charity, they are liable to costs of suit. 2 Br. P. C. 377. 1713.

Where the founder of a charity-school had appointed, that when his trustees should be reduced to two, those survivors should nominate others "being inhabitants of Great or Little Blencowe:" the objection was, that they were not inhabitants of either place; and Lord *Thurlow*, chancellor, said, there should have been evidence that there were proper persons in *Blencowe* to be trustees, and that the survivors neglected them. 1 Br. 439. Atty. v. Cowper. 1785.

The general rule that a mere witness cannot be made a defendant, has been relaxed in the case of a corporation, as in that instance the answer is not put in upon oath: therefore an answer is required from some person capable of making a full discovery, as the agents or servants of the corporation. The rule, however, is relaxed only to that extent: the person from whom the discovery is sought, by making himself a defendant, must have been in a situation of confidence, enabling him to make a disclosure, for the truth of which the court cannot have the security usually taken from the defendants themselves. The exception to the rule is not applicable to any other character or relation of the corporate body. Individual members of a corporation are not proper defendants; their answer cannot be read against the co-defendant the corporation; nor can there be any decree against them: the decree must be made against the corporation, not against the individual members. 14 Ves. jun. 240. Dummer v. Corporation of Chippenham, 1807. Wych v. Meal. 3 P. W. 310.

A demurrer, on the ground that the discovery would subject the defendants to penalties, might certainly be good to discovery only; but that is not a favoured ground of demurrer, and may be waved; and if not put upon the record, the defendant cannot afterwards insist upon it

ore tenus; of which there is no instance. A demurrer
3 P. W. 248. *ore tenus* must go to the whole discovery.

In the case of a charitable trust, Could individual members of a corporation, charged with misconduct, shelter themselves from answering upon oath, by putting in an answer with the rest of the corporation under seal? The case cited from 2 Vernon, 380. is one of the many bad cases in that book. It has never been held that a demurrer will hold on the ground that the defendant is charged with that which may at law be termed a conspiracy: if such strictness were to prevail, there would be an end of discovery in equity, whenever there were two defendants: by allowing the demurrer *ore tenus*, the jurisdiction would be destroyed.

Persons standing in a situation in which all that the court can demand is their testimony in a cause, are not to be made parties; but this is a rule admitting
Ibid. 259. exceptions: in some cases in which arbitrators may be made defendants; in others, wherein attornies who prepared deeds, though they have no interest to convey, give up, or receive, may be parties; and unquestionably the practice is settled, admitting an exception in the case of a corporation, whose officers and servants are made parties.

A corporation not called upon to give any account of corporation property or revenue as such, but happening in their corporate capacity to be trustees for a charitable purpose; entrusted in that corporate capacity with the management of certain property; clothed with a trust for the maintenance of a schoolmaster; and having the power of nominating and dismissing him at their will and pleasure: a corporation, as an individual, with such a power over an estate devoted to charitable purposes, would be compelled to exercise that power, not according

ing

ing to the discretion of the court, but not corruptly. A trustee of either description, a corporation or an individual, cannot be permitted to act corruptly in the execution of the trust: as by dismissing a servant for voting at an election different from themselves, by which the individuals, exercising the power as members, made the corporation the instrument of such corruption. The court will entertain in such cases a bill against the individuals for a discovery whether there was, through their means, such an abuse of the discretion vested in the corporation as trustees, as the court can reform, and will call upon them for an answer.

The case in 1 *Vernon*, 117. though very strong, does not in its language go further than the principle of that in 3 P. W. 310. *Wych* v. *Meal*, determined by Lord Talbot, would extend. What particular circumstances could authorise the court to order, that besides the clerk of the county, such principal members as the plaintiff should think fit should answer upon oath, is not clear; but the principle may have been, that an individual corporator, whose estate was charged with a rent to a charitable use, of which the corporation had the management, had obtained possession of a deed, and had destroyed or cancelled it; upon an information for having the estate properly administered by the corporation as trustees, it would be perfectly competent to call upon the mayor, if he was the individual implicated in that conduct, not only to answer with the rest under their common seal, but also to answer as to the circumstances relative to that deed, supposed to be in his hands.

The reason for making the clerk or officer a party, is, that generally he is the person who can give the information.

In the case of *Steward* v. *E. I. Co.* (2 *Vern.* 380.) Lord

Lord Eldon said, he suspected a misprint. As it stands, that the demurrer was allowed, without putting them to answer to matters of fraud and contrivance, it is nonsense; but if it is read, that the demurrer was disallowed, with liberty to insist by their answer, that they should not answer the charges of fraud and contrivance, it is intelligible. As it stands, he could not understand it, unless the argument can be maintained, that the demurrer was allowed; as otherwise they would be put to answer those charges.

The next case of *Wych* v *Meal* (3 P. W. 310.) furnishes the principle the plaintiff was entitled to a discovery of the matters charged by the bill. Supposing the bill to be true, there would be gross failure of justice, if the plaintiff cannot have a discovery of them. If the principle of convenience and inconvenience pointed out by Lord *Talbot*, and the notion that by allowing that demurrer, there would be a failure of justice, were properly applied in that case of an officer, why should they not be applied in each case, to determine whether the court is authorised to call for an answer? If such a transaction as this could take place, and there were no remedy, the consequence is inevitable, that every corporation, a trustee for charitable purposes, will have the power of eluding intirely the jurisdiction over charitable subjects.

These persons may, by answer, discover part, and may insist either in that mode, or by demurrer, that they are not bound to discover other matters; but the plaintiff may have a chance of proving them: and then might make a case for relief. The demurrer was overruled, without prejudice to the defendants insisting by their answer against making a discovery.

Sir Vicary Gibbs, attorney-general, has requested the following

following rule to be observed on informations for charities. 1809.

"In all informations for charities, I wish to have the draft of the information, and a short statement, signed by the counsel who drew the information, of the object of it, and an assertion that he conceives the case stated to be a case in which an information ought to be filed, and for what reasons. If the information seeks to impeach the conduct of trustees of charities, I shall expect persons to be assured that the relators are of property to answer costs, and that the charges against the trustees are, according to their belief, true. I shall also expect to be informed whether any applications have been made to the trustees, stating the grounds of complaint, and desiring them to reform the abuses complained of, if in their power. And if from circumstances such an application to trustees shall be deemed improper, I shall expect to have stated to me the reasons for conceiving such application improper."

In cases where the purposes of a charitable institution fail, the only means of remedying any abuse which may arise in the misapplication of the trust-estate, is by information in the court of Chancery, at the relation of some respectable person of the county, against those who assume to be the members of the society, corporation, or charity in question, individually, as well as against the corporation by its corporate name, praying an account of its revenues, and that a proper scheme may be laid before the court, and adopted, for applying the revenues to such purposes as should be consistent with the intention of the donors of the charitable estates, as far as circumstances will admit; and if there is a county hospital, the application of the reversions to the support of that hospital may probably be deemed a proper application. Atty. v. Hicks, 1809. Ante. 336.

Qu

Squire v. Wood. C. P. Trin. 1. 2. June, 1809. MSS.

On an application for a rule to search the books of an eleemosynary corporation, established for relief of the poor of Norfolk and Suffolk, in order to obtain evidence to maintain an action for a sum advanced to replenish the funds of the charity, the court declined to stretch its authority so far, unless it were shewn that by the charter of incorporation such a right was reserved. Rule refused.

CONCLUSION.

I SHALL here close my researches on this, to me, very interesting subject: it has afforded me no small extent of grateful pleasure to have been enabled to enlarge my former publication with many additional cases, and much new matter, and also to have been led, in some instances, through the ground which I had already trod, and to have examined by the way some of the more remote parts of the fabric, which I had then overlooked.

The remnants of ancient adjudications in the courts of English jurisprudence, form the basis of a superstructure, which will never suffer by the mouldering incursions of time; nor will the lustre of their justice and equity ever be obscured by the varying successions of political governments, or the more rapid fluctuation of human councils. If the student, to whose inspection this work is submitted, will embrace with ardour the lot to which his labours are devoted, he will find his energy increase in every stage of his progress, for his earliest axioms will be proved to his conviction—his principles

principles will be enlarged upon incontrovertible authority—and his future eminence will be erected upon a security which will reward him with the best honours of his country!

If I have omitted or misstated, I shall be obliged by correction; if my labours shall be accepted as useful, I hall be grateful for the acknowledgement; and if the profession in general will be pleased to assist them, I shall esteem myself as highly favoured, as I have been already by their recent communications.

ADDENDUM.

SINCE the preceding sheet was printed, in which the bill for extending the exoneration of land-tax is noticed, the act has passed, viz. on 3d June, 1809, whereby the act of 46 Geo. III. is recited, in pursuance of which, the special commissioners acting under the great seal, have exonerated 1263 small livings, and 208 charitable institutions, whose clear annual amount did not exceed 150l. and the annual land-tax so discharged amounted to 5670l. 6s. 3¾d. And in order to extend the benefit to others, whose annual income does not exceed 150l. it is enacted, That the commissioners, within 18 calendar months from the passing of this act, may direct the exoneration of the land-tax in the manner prescribed by 46 Geo. III. provided the whole do not exceed, including the above, the sum of 8000l.; similar memorials to be transmitted to them, verified as they shall direct: and certificates signed by two commissioners of land-tax, within Page 482.

within 12 calendar months. The certificate of exoneration is to be indorsed on the certificate of the commissioners of land-tax, and the lands therein mentioned will be discharged from such land-tax, and all further assessments thereof, from such quarter-day of payment of the land-tax, as shall next precede the day on which such certificate shall be left at the proper office for registry of contracts; where the registry shall be made *gratis*, and a duplicate thereof shall be issued, and the copy of such registry signed by the registrar, shall be allowed in all courts, &c. as good evidence of such certificate, without any stamp-duty.

The special commissioners are to lay a state of their proceedings before parliament before the end of the session of 1811.

All deeds not hitherto inrolled or registered, pursuant to the preceding acts of redemption of land-tax, shall be valid if inrolled within 12 months, and all the provisions of the former acts are retained.

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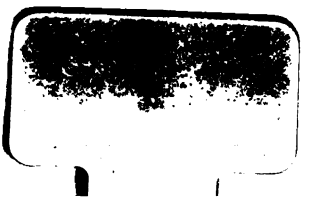
R. Wilks, Printer,
Chancery-Lane.